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REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPERIOR COURTS OF LAW

IN THE

2 S C L

STATE OF SOUTH CAROLINA,

SINCE THE REVOLUTION.

BY ELIHU HALL BAY,
ONE OF THE ASSOCIATE JUDGES OF THE SAID STATE.

VOLUME II.

NEW-YORK:

Printed and published by Isaac Riley.

1811.

DISTRICT OF NEW-YORK, ss.

BE IT REMEMBERED, That on the seventh day of February, in the thirty-fifth year of the Independence of the United States of America, ISAAC RILEY, of the said district, hath deposited in this office the title of a book, the right whereof he claims as proprietor, in the words following, to wit;

"Reports of Cases argued and determined in the Superior Courts of Law "in the State of South Carolina, since the revolution. By Elihu Hall Bay, "one of the Associate Judges of the said State. Volume II."

IN CONFORMITY to the act of the Congress of the United States, entitled, "An act for the encouragement of learning, by securing the copies of "maps, charts and books, to the authors and proprietors of such copies, during "the times therein mentioned;" and also to an act, entitled, "An act, supplementary to an act, entitled, an act for the encouragement of learning, "by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned, and extending "the benefits thereof to the arts of designing, engraving and etching historical and other prints."

CHARLES CLINTON,
Clerk of the District of New-York.

Rec'd. June 1, 1872

PREFACE.

THE encouraging reception which the author's first volume of Law Reports met with from the public, the great necessity there was for the continuation of such a work, and promulgation of subsequent adjudications; and the liberal aid afforded by the Legislature, have all combined to induce him to offer a second volume for publication.

This second volume consists of decisions made in the Constitutional Court, on Appeals from the Common Law Tribunals of Justice, in the State of South Carolina. It is styled the Constitutional Court of Appeals from its being specially established by an article in the State Constitution, and from its jurisdiction being chiefly confined to appeal cases, brought up from the other Courts of Judicature. It is held by all the Common Law Judges of the Superior Courts of Justice, who are required and enjoined by the above constitutional article, to meet at the conclusion of the Circuit Courts, twice in every year, at *Columbia* and *Charleston*, for the purpose of hearing and determining all such motions for new trials, and in arrest of judgment, and all such other points of law, as shall or may from time to time be sub-

mitted to their consideration, from which there is no further appeal; their decisions being final and conclusive.

In the following cases the unanimity of the Judges is frequently mentioned. But it is to be always understood, in every other case, in which a diversity of opinion is not expressly stated.

The reporter has carefully consulted the authors for the cases quoted, to see that the references have been correctly stated, and in general, has exerted his best endeavours to make the whole as authentic as possible.

Judges of the Supreme Courts of Law in the State of South Carolina, during the time when the decisions in the cases in the following volume were made.

ÆDANUS BURKE,
JOHN FAUCHERAUD GRIMKE,
THOMAS WATTES, and
ELIHU HALL BAY.

} Associate Judges from 1796, till December, 1799:

In the year 1799, Judge *Burke* was appointed a Chancellor upon filling up the vacancies occasioned by the death of Chancellor *Hudson*, and resignation of Chancellor *Mathews;* when three new Common Law Judges were appointed, *viz.*

WILLIAM JOHNSTON,
EPHRAIM RAMSAY, and
THEODORE TREZEVANT,

} Additional Associate Judges, making six in the whole.

JOSEPH BREVARD, Esq. of *Camden*, was elected a Judge in *December*, 1801, in the room of *Ephraim Ramsay*, deceased, and took his seat on the bench in *January*, 1802.

THOMAS LEE, Esq. in *May*, 1804, was elected a Judge in the room of *William Johnston*, Esq. who was appointed one of the Judges of the Supreme Court of the *United States*.

JOHN JULIUS PRINGLE, Esq. Attorney-General.

CASES REPORTED.

A

	Page
ANDERSON & Co. v. Robson and Jones,	495
Avaunt and Wife v. Sweet,	528
Ashe, Executors of, v. Executors of Livingston,	80
Abercrombie v Marshall,	90
Devisees of Ashe v. Drennis,	329

B

Bentham *ads.* Lining,	1
Brodie v. Rutledge,	69
East Bay Street Commissioners *ads.* Lindsay *et al.*	38
Brown v. Frost,	126
Brodie v. Prothonotary of Charleston District,	69
Butler v. Baily,	244
Brown v. Collins,	326
Blacklock and Bower v. Stewart *et al.*	363
Bacot v. Keith,	466
Bolan v. Williamson and Chapman,	551
Buyck *ads.* The State,	563
Blacklock and Bower v. Gairdner,	507

C

Callahan v. Hallowell,	8
Canty v. Sumter,	93
Carlin v. Kerr,	112
Cholett v. Hart, Sheriff of Charleston District,	156
Collins v. Westbury and Brown,	211
Cross and Crawley v. Shutliffe and Austin,	220
County Courts abolished,	235
Campbell v. Williamson,	237
Commissioners of Streets in Georgetown v Taylor,	282
M'Candlish v. Cruger,	377
M'Cormick v. Connoly,	401
Chanellor v. Vaughn,	416
Cockfield v. Hudson,	425
Carpenter v. Coleman,	436
Carrol v. M'Whorter,	463
Executors of Compty v. Alken,	481
Coleman *ads.* Guardian of Negro Ben,	485
Connoly v. Stewart,	509
Collins v. Kincaid,	536
Carsan v. Rambert,	560

D

Daub v. Martin,	193
Dillon v. M'Cue,	280
O'Driscoll v. Viard,	316
——— v. M'Cants,	323
Dickson, Executor of Dickson, v. Bates,	448
Douglass v. Frizzle,	417

E

East Bay Street Commissioners *ads.* Lindsay *et al.*	38
Edwards v. Thayer,	217
Executors of Willson v. Winn,	517

F

Fabre v. Bower,	124
——— v. Zylstra,	147

PAGE

Frink & Co. *ads.* Luyten, - - 166
Frasers *ads.* M'Leod, - - 407
M'Faddin and Wife v. Haley, - 457
M'Farlane v. Harrington, - 555

G

Greenwood v. Colcock, - 67
Greenwood v Bocquet, - - 86
Gibbes v. Mitchell, - - 120
Gist v. Bowman, - - - 182
Gadsden v. Poaug - - 293
Gibbes v. Mitchell, - - 351
——— v. ———, - - 406
Gibbes v. W. B. Mitchell, - 467
——— v. W. H. Mitchell, - 475

H

Hane and Berck v. Goodwyn, - 521
Hannahan v. Executors of Hannahan, 68
Hunt v. Simons, - - 104
Hopkins v. De Graffenreid, - 187
Hopkins v. M'Pherson, - - 194
Devisees of Hawkins v. Arthur *et al.* 195
Heyward v. Brailsford, - - 255
Executors of Harth v. Heddlestone, 321
Hughes v. Kiddell, - - 324
Hart v. Tobias, - - 408
Harrison & Co. v. M'Kinney, - 412
Hill v. Williams, - - 433
Hopkins v. De Graffenreid, - 441
Hopkins v. Albertson, - - 484
Hawkins v. Hall *et al.* - - 449
Hort v. Jones, - - - 440

J

Judges of Fairfield County v. Phillips, - - 519
James v. O'Driscoll, - - 101

K

Key v. Holeman, - - 315
Kennedy v. Smith, - - 414
Kershaw District, Ordinary of, v. Bracey and Nourdin, - - 542

L

Lining v. Bentham, - - - 1
Lenox v. Hallowell, - - 8

PAGE

Lindsay v. East Bay Stree Commissioners, - - - 38
Lynch v. Withers, - - 115
Luyten v. Haygood, - - 177
Lamb v. Hart, - - - 362
Levingsworth *et al. ads.* Fox, - 520

M

Mey v. Tunno and Cox, - 307
Mulder v. Cravat, - - 370
Murrell v. Mathews, - - 397
Massey v. Trantham, - - 421
Muse v. Laughridge, - - 426
Mounce v. Ingraham, - - 454
Mackay v. Reynolds, - - 474
Maverick v. Stokes, - - 511
Marane v Carroll, - - - 525
Middleton *ads.* Perry, - - 539
M'Farlane v. Harrington, - 555

N

Newbiggin v. Pillans and Wife, - 162
Neale v. Lewis, - - - 204
Neilson v. Emerson, - - 439

O

Osborne v. Bowman, - - 208
O'Driscoll v. Viard, - - 316

P

Payne v. Trezevant, - - 23
Powrie and Dawson v. Fletcher and Phillips, - - - 146
Penman v. Hart, Sheriff of Charleston District, - - 251
Pourie and Dawson v. Fraser, - 269
Payne v. Winn, - - 374
Perry v Walker, - - - 461
——— v. Middleton, - - 462
Pickins & Co. v. Garnett, - 543
Purvis v. Tunno and Price, - 492

R

Rose v. Macleod, - - 108
Ramsay *ads.* Gervais, - - 145
Ramsay v. Company of Wardens, 180
M'Raa v. Smith, - - 339
Reigne v. Dewees, - - 405
Rochell *ads.* Holmes, - - 487

PAGE

Rowe, Sheriff of Orangeburgh District, *ads.* The State. - - 565

S

The State v. Gaillard *et al.* - 11
—— —— v. Connor, - - 34
—— —— v. Smith and Cameron, 62
Shoolbred and Wife v. The Corporation of the City of Charleston, 63
Shackelford v. Barrow, - - 91
Sessions v. Barfield, - - 94
The State v. Doctor Fraser, - 96
—— —— v. Rippon, - - 99
Singleton v. Tobacco Commissioners, 105
The State v. Quarrel, - - 150
—— —— v. O'Driscoll, - 153
Slade v. Teasdale, - - 172
The State v. James, - - 215
Schepler v. Garriscan and Carpioin, 224
Shaw v. M'Combs, - - 232
Skirving v. Stobo, - - - 233
The State v. Holly, - - 262
—— —— v. Harding, - - 267
Stephen v. Thayer, - - 272
Strange v. Evans, - - - 327
Street Commissioners of Georgetown v. Taylor, - - - 282
Surtell *ads.* Brailsford, - - 333
Snee v. Trice, - - - 345
The State v. Gilbert, - - 355
—— —— v. Dawson, - - 360
—— —— v. J. Johnson, - - 385
Smith v. Sheriff of Charleston District, 395
The State v. Findlay, - - 418
Strange v. Durham, - - 429
Steen v. Drake and Cavenah, - 431
Sumpter v. Murrell, - - 450
The State v. Brisbane, - - 451
Stockton v. Martin, - - 471
Sumter v. Bracey, - - 515
The State v. Jones and M'Cartan, 520
Sims v. Randall, - - - - 524

PAGE

Simpson and Morrison *ads.* Geddes, 533
Smith v. Mary Brisbane, Executrix of A. F. Brisbane, - - 557
Sumter v. Welsh, - - 558
The State v. Buyck, - - 563
Sweet *ads.* Avaunt and Wife, - 492

T

Thompson v. M'Cord, - - 76
Thompson v. Mallet, - - 94
Thayer & Sturgis v. Sheriff of Charleston District, - - 169
Teasdale *ads.* Slade, - - 172
Teasdale v. Sheriff of Charleston district, - - - 173
Tunno and Cox *ads.* Sukeley, - 505
Teasdale *ads.* Reaborne, - 546
Taylor *ads.* Myers, - - 506

V

Vanderhorst, Executors of, v. Whitner, - - - - 399
Vanderhorst & Co. v. M'Taggart, 498
Underwood v. Evans, - 437

W

Wells v. Martin, - - 20
White v. Chambers, - - 70
Waring v. Catawba Company, - 109
Wallace v. Rippon, - - 112
Wade v. Barnwell, - - 229
Waton v. Bostwick, - - 312
Whitefield v. M'Leod, - - 380
Williamson *et al.* v. Tunno and Cox, 388
Williamson v. Turner, - - 410
Wright v. Gray, - - - 464
Woods v. Woods, - - 476
Wallace & Co. v. Depau and Kern, 503

CASES

ARGUED AND DETERMINED

IN THE

CONSTITUTIONAL COURT OF APPEALS,

OF THE

STATE OF SOUTH CAROLINA.

FROM THE YEAR 1796 TO THE YEAR 1802,
BOTH INCLUSIVE.

Present, BURKE, GRIMKE, WATIES and BAY, } Associate Judges.

WILLIAM LINING *against* JAMES BENTHAM, a Justice of the Peace for Charleston District.

Charleston, Jan. 1796.

MOTION for a new trial.

This was a special action on the case, against defendant, for oppression in the execution of his office, as a justice of the peace, by committing the plaintiff to prison, and depriving him of his liberty, &c. &c.

It came out in evidence, on the trial of this cause, that one *James Duncan* had been guilty of a breach of the peace; and that upon an application to Mr. *Bentham*, as a magistrate, by the person injured, he issued his warrant against the offender, in order that he might be apprehended, and bound over to answer for the offence; and in the mean time, to be of good behaviour. That *Duncan* was taken by virtue of this warrant, and carried before the defendant, as a justice of the peace; who ordered him to enter into a

A justice of the peace, may commit for a contempt in his presence, and his warrant of commitment under hand and seal, is the best evidence of such contempt.

He is not liable in a special action on the case, for what he does in his judicial capacity, though he may be punished on an indictment if he acts oppressively.

Lining v. Bentham.

recognisance with good security for his appearance at the then next court of general sessions of the peace, &c. for *Charleston* district, and also for his good behaviour.

The plaintiff, *William Lining*, was present, and offered himself as surety for *Duncan*, but not being a freeholder in the district, or even a householder in the city; and being perfectly unknown to the defendant, he refused to accept of him; upon which the plaintiff got into a violent passion, and accused the defendant with gross partiality, and abuse of power, in his office as a magistrate, accompanied with very abusive and disrespectful language to his face, and in the presence of a number of by-standers. Whereupon the defendant immediately committed him to the common gaol of the district of *Charleston*, for this contemptuous behaviour; it was, therefore, for this supposed injury that this suit was commenced.

On the trial, *Duncan*, the first aggressor, was called upon as a witness by the plaintiff, in order to extenuate his conduct, and to shew that he had not behaved in so disrespectful a manner, as to justify the defendant in committing him to gaol, which was objected to by defendant's counsel on two grounds: 1st. Because it would be forming a precedent for two culprits to confederate together, in order to overturn and destroy the power and authority of a magistrate, in the due execution of his authority, in preserving the peace of the community; and, 2dly. Because it would be allowing parol testimony, to contradict the proceedings of a judicial officer, plainly and distinctly set forth in the warrant of commitment, and the facts contained in it as the reasons and grounds for the exercise of such a necessary act of power. It was further urged on behalf of the defendant, that the superior courts of law were bound to protect magistrates and the inferior tribunals established in the country, for the maintenance of peace and good order, unless they were guilty of flagrant abuses of power, for the purposes of oppression.

For the plaintiff, in reply, it was contended, that if the testimony of witnesses, who were present at the time and

place where the supposed contempt was offered to the magisterial authority of defendant, was refused, and the record or commitment alone, was to be conclusive evidence of the contempt; it would put the citizens of this country very much in the power of magistrates, who might deprive them of their liberties, without the possibility of guarding against the imprisonment of their persons, and that, too, in the most summary and expeditious manner, before they could have an opportunity of vindicating themselves; and although they might afterwards be discharged from such imprisonment, they must in the first instance, be compelled to undergo the ignominy and disgrace, of being confined within the walls of a prison.

GRIMKE, J. who tried this case, observed, that he considered it as an important one, involving in it the power and authority of the justices of the peace, throughout the state, on the one hand; and the personal liberty of the citizen, on the other. That unless magistrates were treated with respect, and their authority supported against high handed offenders, the public peace could not be maintained; while at the same time he was bound to say, that the liberty of the citizen was one of the primary objects of the laws of our country. To distinguish, therefore, correctly between the abuse of power, and a proper and well-timed exertion of it, would require the good sense and sound discretion of the jury on this occasion. That every man who was taken before a magistrate, was bound to behave himself with respectful deference to his authority, and to submit to his decisions, (until he could have redress, if injured, from higher authority,) and no man was justifiable in flying in the face of the magistrate's authority, and treating him with contumely and abuse; even if he was mistaken in his opinion, upon any subject of which he had jurisdiction. That, if magistrates, however, under colour of office, should injure or oppress their fellow citizens, they were liable to be punished in a criminal court for their misconduct.

Lining v. Bentham.

That as soon as *Duncan* was carried before the defendant, it was clearly within his province, to determine whether to bail, or commit him for want of bail. It was also within his province, to determine who was, or was not, a proper person to be accepted as bail; and having done so, it was the duty of the parties to submit to the defendant's decision.

With respect to the admission of *Duncan*, who was the original aggressor, as a witness, he was of opinion, that on strict principles of law, the objection was a good one; as it was easy to foresee, that it would be enabling and encouraging confederates, in opposition to lawful authority, to swear for each other; yet he thought it better on the whole, to let such witness be sworn and leave his credibility to the jury, than to reject him on the ground of incompetency; with liberty to defendant to move for a new trial, in case a verdict should be against him.

Duncan was then sworn, and substantially contradicted every thing which had been alleged by the defendant, as a justification for his conduct; after which, the jury retired, and soon after returned into court with a verdict 3*l.* sterling, for the plaintiff, and costs of suit.

The present was, therefore, a motion to set aside this verdict, and for a judgment of nonsuit, or a new trial.

The grounds taken on this motion, were nearly the same as those taken on the trial of the issue. But it was now further contended on the part of the defendant, 1. That as he acted in *his judicial capacity* as a justice of the peace, and not in *his ministerial* one, he was not liable in this action. 2dly. That parol testimony, ought not to have been admitted to contradict the matter contained in the warrant of commitment for the contempt.

The counsel, in support of the motion, on the first ground urged, that there was a wide distinction, between the ministerial, and judicial acts of a magistrate. That in his ministerial acts, in putting the laws in force, against offenders of every description, he was bound to see, that the nature of the charge alleged, was such as the party was liable to be prosecuted for; and that supported by the

oath or affidavit of the party injured or aggrieved, or some other reputable person on his behalf; also in causing them to be apprehended and brought forward to answer the charges against them, he was to proceed regularly at his peril: and if any person was injured by him, by any irregular or improper proceedings, he was liable in this special action on the case for damages. But in his judicial capacity, as a judge, he *was liable only by indictment, at the suit of the state;* and that too only in cases where he acts corruptly or oppressively. In all these cases he is liable to be punished by the court, according to the nature of the offence. 2 *Comyn*, 615. 2 *Hawk.* 85.

In the present case it was said, that the magistrate had been guilty of no irregular conduct, in issuing his warrant, and causing the party accused of the assault to be brought before him; so far he acted ministerially. When the offender was brought before him, then his judicial functions commenced, by determining what was to be done with him afterwards; whether to be bailed, or committed. He, it appears, was of opinion, very properly, that being a bailable offence, he should be admitted to bail; but at the same time, when the plaintiff in this action was offered as surety for *Duncan*, he was further of opinion, that he was not a proper person to be accepted as security, not having the qualifications requisite by law, to qualify him for being such bail. It was therefore upon the determination of this last point, that the plaintiff got into a passion, and vilified and abused the magistrate. He was therefore most evidently, in the legal exercise of his judicial authority, when this contemptuous behaviour was offered to him, and that too for an opinion which he had but a moment before delivered on the subject. This, therefore, it was contended, brought the defendant within the rule of law laid down in the above authorities; and totally exempted him from all responsibility, in the present form of action.

It was also urged, in justification of the magistrate, that it was not only lawful and proper for him to exercise the power of commitment, but that there was no other method,

Lin v. Benton.

sufficiently speedy and effectual, to protect the magisterial authority from the insults and contempts of disorderly men, and that he would have been unworthy of the trust reposed in him by his country, if he had not committed him.

2. Upon the ground of the admission of *Duncan* as a witness to contradict the warrant of commitment, it was argued, that it was admitting parol or inferior testimony to contradict the written judgment or decision of the magistrate, under his hand and seal; which was the highest evidence the nature of the thing was capable of. That while sitting in his judicial capacity, he constituted an inferior court of competent powers to vindicate his own authority; and that his proceedings were to be taken and deemed in law as conclusive evidence of what passed before him, touching the contempt offered.

Against the motion, it was urged on behalf of the plaintiff, that if the doctrine contended for by the defendant was established as the law of the land, that the magistrate's commitment alone was to be conclusive evidence of contempts, it would put the citizens of the country very much in the power of magistrates, who might deprive them of their liberties without a trial by jury, which was secured to every freeman by *magna charta* and our own constitution. That such an exercise of power was against another well established maxim of law, that no man should be a judge in his own cause, or determine any point in which he was personally interested.

The Judges, after hearing counsel on both sides, and having fully considered this case, were unanimously of opinion on the first ground, that a special action on the case was not a proper remedy. But if there had been any just cause of complaint on the part of the plaintiff, it should have been preferred by way of indictment in the court of sessions; and if he had been convicted of corruption or oppression, in his judicial capacity as a magistrate, it would have been the duty of the court to have punished him, by fine or imprisonment, or both, according to the nature of the offence.

That it is very evident from the whole complexion of this case, that Mr. *Bentham* was acting in his judicial capacity, as a justice of the peace, when this contempt set forth in the commitment was offered to him ; and the law is equally clear, that a justice of the peace is not answerable in an action for what he does by virtue of his judicial power. 2 *Hawk.* 85. *Carth.* 494. 3 *Burn*, 33.

With regard to the power of a magistrate to commit for insults or contempts offered to him while in the due execution of his office, it is incidental to magisterial authority ; and without such power, he could never vindicate or support the laws, which are intrusted to his management, and over which he has jurisdiction. That a magistrate, sitting in judgment touching a matter within his jurisdiction, constituted a court in law, though an inferior one, and he was bound to protect the authority of such court. And one general principle, incidental to all courts, as well superior as inferior, was a power to commit for contempts, either by *word or deed*, offered in the presence of the judge, and in the face of such court. And this is not against *magna charta*, or the law of the land, but forms a part of the common law, which is recognised by the terms of our constitution. 5 *Vin.* tit. *Contempts*, 447. *Lill. Pract. Reg.* 305. *Gilb. Hist. C. B.* 20, 21. 2 *Hawk.* 96. 112, 113.

A culprit connected with the party offering a contempt, is not a competent witness to criminate the magistrate.

The Judges were further of opinion, that *Duncan* should not have been admitted as a witness on the trial to criminate the magistrate, as he was a party in the complaint then before the justice of the peace ; and it had a tendency, as had been justly observed in the argument, to encourage culprits to confederate together, to destroy the power and authority of the magistrate ; and the more especially, too, as his testimony went to contradict the highest evidence or record of the contempt, set forth in the commitment under the hand and seal of the magistrate.

That with respect to the last ground insisted on by plaintiff against the present motion, that of a man's not being a judge in his own cause, the maxim was in general a true

Lining v. Bentham.

A justice of the peace may be a judge of contempts offered to himself in the execution of his office; and this is an exception to the maxim of law that no man shall be a judge in his own cause.

and legal one, in every private matter in which a justice of the peace may be interested. But in the present instance, the public peace and good order was principally concerned; and he did not act in his own private case, but as a public officer in support of the peace, and this forms an exception to the above maxim of law. For it is clearly laid down in all the books of authority upon this head, that if any contempt is shewn to the authority of a magistrate, or insult offered to his face, while in the execution of his office, he may act as a judge in such cause, and commit the offender; though he may proceed less summarily, if he pleases, by indictment. The true rule of distinction seems to be this, that where contumelious words are spoken, or other insult is offered to a justice of the peace, and in his presence, he may commit; but when spoken behind his back, he ought to proceed by indictment. 3 *Burn*, 33. *Salk.* 698. 3 *Mod.* 139. 2 *Show.* 207.

Verdict set aside and new trial ordered; but the case was never afterwards brought forward.

Charleston District, 1796.

CALLAHAN *against* HALLOWELL.

LENOX *against* THE SAME.

The first writ of attachment lodged in the sheriff's office is entitled to a priority of lien on absent debtor's goods, though a second writ of attachment is first served on a garnishee.

THESE were two cases under the attachment act of this state, against the effects of the absent debtor, which were in a warehouse or store belonging to the corporation of the city of *Charleston*, under the care of the city treasurer.

It was admitted, that *Callahan's* writ of attachment was lodged in the sheriff's office about one minute before *Lenox's*, but the sheriff's officer served a copy of *Lenox's* attachment on the city treasurer, under whose charge the goods were, before *Callahan's*.

So that the point made and submitted to the court, by the counsel on both sides, was, which of these two plaintiffs should have the preference? The officers of the corporation also prayed the opinion and advice of the court on the same point, in order that they might know how to make a proper return to these writs, as garnishees, that they might not be entrapped by giving an improper preference to either of them.

The Court, after consultation, was of opinion, that as the sheriff's office was a public one, where all writs were lodged and entered before service, the first writ of attachment lodged there should have the first lien on the goods; and that it was the duty of the sheriff to serve the writ first lodged on the garnishees in the first place, and others in rotation afterwards, agreeably to their seniority; otherwise it might be in the power of the sheriff to vary the right of the parties, and to give a preference to which of them he pleased, by serving one or the other first, as he thought proper. The vigilant creditor, therefore, is to be preferred.

That the small difference of the time in lodging these writs, did not alter the principles by which they were to be governed. For in all cases where priority of action becomes essential *to the right of the parties*, the different days must be shewn, if the writs are lodged on different days; but if two or more actions are commenced on the same day, then the exact time must be ascertained; for although the law in general will not allow of fractions in days, yet it admits it where it is necessary to distinguish who has a priority; as in *qui tam* actions, informations for usury, or the like, the very hour may be shewn. 3 *Burr.* 1434. If, then, the very hour may be shewn, there is no drawing the line but by priority; the very minute may be shewn upon the same principle; and that must govern and determine the right of the parties. Time is in its nature divisible from years down to days, hours and minutes: a minute, therefore, will give a priority as essentially in point of time as a year or a day.

Callahan v. Hallowell.

The writ is considered as the commencement of the suit, 3 *Burr.* 1243. and the delivery to the sheriff as the time when it is commenced.* *Callahan's* writ being, then, the first delivered into the sheriff's office, the court will therefore consider him as the first attaching creditor, and entitled to a preference, and that the return of the corporation ought to be made conformably.

Mr. *Holmes*, the intendant of the city, being then present in court, suggested a difficulty which occurred in making these returns, as the attachment law requires that a return upon oath must be made by garnishees in possession of goods belonging to an absent debtor, and that the goods in the present case were in possession of the corporation, which could not take an oath, and therefore prayed the direction of the court in making the returns to these writs. Whereupon the court was of opinion, that all returns to such writs, on the part of the corporation, ought to be made by the intendant, who was at the head of that corporate body, under his hand and the seal of the corporation, as an oath could not be expected from a corporate body.

A corporate body which cannot make an oath, is to make returns to writs of attachment by the officer at the head of such corporation, under his hand and the seal of the corporation.

N. B. Some of the members of the bar seemed to think the above determination respecting the priority of attachments was a point of great importance, and therefore wished it more fully argued, to which the court most readily assented; but all the parties afterwards acquiesced in the decision, and it was never again brought forward.

Present, BURKE, WATIES and BAY.

* This has often been determined in cases where the statute of limitations has been pleaded.

THE STATE *against* THEODORE GAILLARD, JOHN BULL and JOHN BRYANT. *Charleston District*, 1796.

DEBT on bond for 4,441*l.* 7*s.* currency, equal to 634*l.* sterling.

The bond, on which this suit was commenced, was given for a tract of land purchased at a public sale, made by the commissioners of forfeited estates, under the confiscation act. At this sale a very handsome plat of the land was produced, representing the quality of the land, &c. taken, as alleged, from actual observation and measurement, and containing 2,535 acres. On this plat a fine copious stream of water was laid down as running nearly through its centre, with a mill-seat represented on it, which was the principal inducement of the defendants to make the purchase; as the land was valuable only on account of the timber growing on it, and this stream of water and mill-seat, which were represented on the plat, containing notes and memorandums explanatory of these natural advantages.

The defence set up against this bond was misrepresentation or deception, at the time and place of sale. That the defendants had been deceived by this plat representing a bold stream of water, sufficient to turn a mill the whole year round, with a good mill-seat upon it; whereas, in truth and in fact, it was found upon examination that this supposed stream was a mere gully, which was dry three-fourths of the year, and contained running water only in wet seasons, or after heavy falls of rain. That by this failure of water, their plan of erecting a saw-mill was entirely defeated, as the great object they had in view having been the sawing of lumber for the market. Moreover, that there was a deficiency of 555 acres in the quantity of land. This deficiency, however, was not so much relied on, for a rescission of the contract or sale *in toto*, as an abatement of price might have answered the ends of justice to all parties; but what the de-

Misrepresentations on the plat of lands produced at the time and place of a public sale, are good grounds for a rescission of the contract. As where a fine stream of water is laid down, with a good mill-seat on it, in the centre of a tract of timber land, fit only for lumber, and which upon examination turned out to be only a dry gully three-fourths of the year, without any running water in it. Such misrepresentation may be given in evidence against a bond given for the consideration money, by way of discount, under the terms of the discount act, in a court of common law.

The State v. Gaillard and others.

fendants relied on, was the fraud or imposition practised upon them, by this false representation on the plat produced at the sale, and which deceived them in making the purchase.

The defendants then called two surveyors who had resurveyed this land, and several other witnesses, who all proved substantially, the facts stated in the defence, as well with regard to the total failure in the stream of water, as to the deficiency in the quantity of land sold. The cause then went to the jury, who, under the direction of the judge, and on the authority of *Gray and Handkinson's* case, tried in *October* term, 1792,(*a*) brought in a verdict for defendant; whereby the whole contract was rescinded. Thereupon the counsel for the state gave notice of a motion for a new trial, to be made at the next meeting of the constitutional court of appeals, on the ground of misdirection of the presiding judge; and that the finding of the jury was against law. At the meeting of the constitutional court of appeals, in *January*, 1796, the above motion was brought forward, and in support of it, the following grounds were submitted to the court.

(*a*) See *Bay's Rep.* vol. 1. p. 278. *Riley's* edit.

1. That a common law court could not rescind a contract, and that a court of equity only was competent thereto.

2. That one *Archibald* bid off the land at the sale, and there was no proof that he had a mill-seat in view; and if he was not deceived, no one coming in under him had a right to complain.

3. That the commissioners of forfeited estates did not warrant the mill-seat and stream of water, as being good and proper for a saw-mill; they only sold from the plat made by the surveyor, on behalf of the public; and,

Lastly, that this sale having been made by the state, it was not to be governed by the same rules as private sales.

This motion was argued by *Ford* and *Trezevant* in behalf of the state, and by General *Pinckney* for defendants.

For the state it was contended, that the court of chancery was the proper tribunal for investigating all matters of fraud, accident and trust, and was the only one competent to do full and complete justice in all such cases. And it was their peculiar province to determine, when, or in what cases contracts were or were not to be set aside on the ground of fraud or misrepresentation. That in our state three chancellors presided in the court of equity, who were men of great legal knowledge and integrity, and who would exercise their powers as to the dissolution of contracts, with all the requisite discretion and caution. That they would never rescind a contract until after the fullest examination, of which the nature of the thing was capable. That in such hands, contracts were safe and stable; the principles well ascertained by authorities and adjudications; and the rules of law and equity form their steady guide in determining cases of this sort. That while this was the case, men in their mutual contracts and bargains, and all their various transactions, might have a confident and safe reliance. But on the contrary, to make jurors the judges of the rescission and dissolution of solemn agreements, entered into with due solemnity and caution, would introduce all that fluctuation and uncertainty, which for ages past it had been the wisdom of the law to guard against. Jurors were often composed of unlearned men, often biased on one side or the other, and too frequently carrying their prejudices into the jury box. That in cases of this nature they had no fixed rules or principles to govern their verdict; that one jury would do on one day, what another would undo the next; nothing like certainty could be expected, and every thing might be set afloat and unhinged, by committing so great and so extensive an office to such unskilful hands.

On the second ground it was contended, that one *George Archibald* was the purchaser at the sale. The land was knocked off to him by the cryer, and there was no evidence offered to the jury who tried the cause, to shew that he was deceived by this plat or the declarations of the commissioners, but admitting that the plat might have had that

The State v. Gaillard and others.

tendency, that was a matter between him and the commissioners, and not one of which the defendants could avail themselves in order to get rid of their contract, and set aside their bond.

That there was no warranty on the part of the commissioners, that the stream laid down on the plat was a never-failing stream, or that it would turn a saw-mill all the year round. They offered the land for sale, such as it was, with all its advantages and disadvantages attached to it, and the plat produced was more for the purpose of shewing the metes and bounds of the land, and the quantity contained within the lines, than for any other purposes whatever.

And finally, it was urged in support of the motion, that this sale was a public sale made by the state, a corporate body, which could not make, nor was it bound to make, the representations of the good or bad qualities of the land offered for sale, which a private individual is bound to do in his contracts with another. *Caveat emptor* was a good rule in such case; the defendants should have taken care to have informed themselves fully on all these points, before they made the purchase.

Pinckney, for defendants, against the motion, admitted that the law had formerly been as his opponents had stated: that this power of setting aside or rescinding contracts, once belonged exclusively to a court of equity; but that modern improvements had been made in almost every branch of our jurisprudence, for wise and judicious purposes; and amongst others, that of a common law court taking cognisance of such cases, as the present one, as well as an equity court.

That the great point here was fraud, or no fraud? That fraud might either be the result of deliberate design, or it might arise from circumstances, resulting from the nature of the transaction itself, where none was intended. But that from whatever cause it arose, if it could be traced out and established, by common law rules of evidence, it was as much within the jurisdiction of a common law court of judicature, as within that of a court of chancery. That in a

great variety of cases, it was usual and customary for the courts of chancery to send down issues, to be tried at common law, to enable the chancellors to proceed finally to determine on the justice of the case. Now if it was right and just for the courts of common law to try collateral points, arising in the course of a cause depending in equity, it was surely right and proper for them to try the whole of a cause, where the whole of the merits could be brought fairly before them in the first instance. That a jury was as much under the control of the court, and subject to its direction in the one case as in the other, and the court would see that justice was done in cases originating at common law, as well as on issues directed by a court of equity; and if they erred, or deviated either in point of law or fact, the constitutional court would always grant a new trial *toties quoties*, &c. And this power in the common law courts would always be an effectual security to all kinds of contracts which were fair and lawful, and would be a sufficient check against all the inconveniences so much apprehended by the gentlemen on the other side of the question. Besides, the remedy in a court of common law, was much speedier and attended with less expense, than in a court of equity. Our discount law, he next contended, expressly allowed such a defence as the present one. It enacts, "that "in all actions whatever, brought for the recovery of any "debt, it shall and may be lawful, for the defendant, if he "have any account, reckoning, demand, *cause*, *matter* or "*thing*, against the plaintiff, to give the same *in evidence*, "by way of discount, regard always being had, *to the cause* "*of action*, so that such demands, causes, matters and "things, &c. relating to defendant in his own right, shall "only be given in evidence by defendant, in a suit brought "against him in his own right," &c. He then quoted the case of *Cooke* v. *Rhine*,(a) tried in 1783, which was the first case in this country in which a common law court, under a fair construction of our discount law, permitted this kind of equitable defence to be set up, as springing out of the transaction itself. That suit was for a workman's bill in build-

See *Public Laws*, p. 246.

(a) *Bay's Rep.* vol. 1. p. 16. *Riley's* edit.

The State v. Gaillard and others.

ing a house: the discount was the loss of rent occasioned by unreasonable delay, and for sundry deficiencies in the building and unfaithful workmanship, in which the jury, under the direction of the court, allowed a discount to the amount of 220*l.* sterling. The next case was that of *Mills* v. *Dewees*, which was a suit for the price of a negro sold with a good character, who was proved to have been a drunkard, a thief, and runaway: the discount was to the amount of the full value of the negro; and the jury found for defendant. The case of *Gray* v. *Handkinson*, the next in order of time, was very similar to the present one; where a mill-seat on a good stream of water, was the object of the purchase, but as it was taken away by an older grant, in an action on the bond for the consideration money, a verdict was given for defendant; by which means the contract in that case was rescinded *in toto*. All these cases, and a great many determined since, upon the same principles, vindicated and justified the courts of common law in this state, in opening the door for the admission of these kind of equitable defences; which prevented a multiplicity of actions, and went at once to the real merits of the case.

That in answering to the second ground taken in support of the motion, he said, *Archibald*, by whom the land was bid off, was only the mere agent of the defendants on the occasion: that the entry in the commissioners' books of sales was to them, and not to *Archibald;* the deeds of conveyance were to them; and they gave the bond to the commissioners, on which the present suit was brought. All this proved him to have been a mere agent. But supposing he had not been their agent, and they were to be considered as his assignees, they would then stand exactly in his shoes, and had a right to avail themselves of any ground of fraud of which he himself could have taken the advantage.

That although the commissioners did not in express words declare that this was a constant and never-failing stream of water, which ran through this tract, yet such a representation on the plat by the surveyor-general, an officer

of high trust, or his deputies employed on the part of the state, was as much calculated to impose upon an unwary and unsuspecting purchaser, as any parol declarations of the commissioners; nay, more so, as it held out the idea of actual observation and examination of the premises, by such officer, which by most men, would be much more regarded than the loose, random declarations of the commissioners themselves at the sale.

As to the last ground urged in support of the motion, he observed, that although the sale was made under a public law of the state, and by public authority, no good reason could be assigned, why the state as a public body, should be protected in a fraud committed (though unintentionally) by any person acting under its authority, any more than an individual citizen under similar circumstances. Good faith ought to be observed by public bodies, as well as by private citizens; and if any one is injured by such corporate body, or its agents, the party injured is entitled to redress, as well as from a man in his private capacity.

Mr. Justice BURKE delivered the opinion of the judges, who were unanimously with the defendant on every ground. He observed, that the governing principles by which this case, and all others of the like kind had been, and were to be decided, were borrowed from the civil law, and incorporated into, and now made a part of the common law of this country, viz. "*that a sound price deserves a sound* "*commodity*," and that wherever there is "*a failure of* "*consideration, a misrepresentation, or concealment of mate-* "*rial circumstances*," it vitiates the contract *in toto;* or entitles the party injured to such a reasonable abatement in the price of the thing sold or demanded, as would make him full reparation for any injury sustained by reason of such unsoundness, failure, misrepresentation or concealment, according to the nature and circumstances of every

1 *Domat.* 90, 81.

The State v. Gaillard and others.

such case. Of all such circumstances and injuries, whatever their extent might be, the juries of this country, under the direction of the common law courts, were as competent to determine, wherever they could be traced out and established by legal testimony, as a court of equity. That in the exercise of this power, the courts of common law, always had been and ever would be extremely cautious in charging juries, so as to guard against the too easy and frequent admission of testimony, which might go to render contracts insecure. That good faith and confidence ought to be maintained by men in their mutual dealings and transactions with each other. That men were free to contract and make bargains, or to let them alone, as they thought proper; but when once made, they were binding, and the contractors ought to be held to them, in all cases, unless they came fairly within the above exceptions; and then it was proper and just, for juries to interfere and do substantial justice between the parties, by giving such verdicts as would place both of them in their original situation, or give partial satisfaction for partial injuries.

A court of common law is equally competent with a court of equity, to rescind and set aside contracts on the grounds of fraud, where such grounds can be traced out by common law rules of evidence.

Domat. 81.

Public Laws, 246.

That the principles of our discount act of the legislature, passed in 1759, and made perpetual by the act of 1783, coincided with the rules of the civil law, by permitting a defendant to set off by way of discount against the plaintiff's demand, any cause, matter, or thing in his own right, and springing out of the same transaction, which went either to defeat the plaintiff's right, or to require an abatement in his demand; which renders it highly presumable, that the legislators of that day, had the principles of the civil law in view, when they passed that act.

In comparing this case with the foregoing rules, he said, there could be little doubt, but that this contract ought to be set aside on the ground of fraud or misrepresentation. The object the defendants had in view, was the sawing of lumber for the *Charleston* market. The land, it was admitted, was of little or no value, but for the timber growing on it. A good stream of water, and a mill-seat, therefore, were essentially necessary for carrying into effect, the ob-

The State v. Gaillard and others.

ject the purchasers had in contemplation, and without these, their ends never could have been answered. The plat produced at the sale, represented upon the face of it, these essential requisites. It carried, therefore, falshood and misrepresentation in its front; well calculated to take in, and deceive unwary men, who were likely to trust to such representations made by public men in the execution of a public trust. There was nothing better calculated to impose upon a purchaser, than a plat which had the appearance of an actual survey and observation, with explanatory notes made upon it. Many an unfortunate *European* had been deceived by the *American* land speculators, in the same manner; and unfortunately, too many of the purchasers had been ruined by it. It was said the commissioners were ignorant of it; they did not know that there was no such stream. But that made no sort of difference, as to the real existent facts; for it was the same thing to the purchaser, whether they knew, or did not know, there was this stream; for it is a well known rule of the civil law, that where the defects of a thing sold were unknown to the seller, he shall be bound not only to take it back, but to indemnify the purchaser or buyer, as to all the charges the sale has put him to. *The receipt of a full or valuable consideration in law, raises an implied warranty, against all faults, known and unknown to the seller;* with this difference, that in cases of wilful concealment, the party guilty of the fraud, is liable for damages, in addition to all legal and just charges.

1 *Domat.* 81.

A sound price deserves a sound commodity, whether known or unknown to the seller.

As to the other grounds taken in support of the motion for a new trial, they all follow the main or principal one, already discussed. A fraud practised upon the agent, was a fraud through him on the principals, and went radically to the dissolution of the sale. Any misrepresentation calculated to deceive, went to impair a contract, as much as parol declarations by the sellers, to that effect. And as to the effect of sales in general, there was no difference between public and private ones, as to defects in the thing itself sold, except as to incumbrances, which might be well

The State v. Gaillard and others.

ascertained by due diligence. Holding out false representations therefore by any of the public agents, went as effectually to render a sale invalid with the state, as if it had been practised by an individual citizen.

Rule for new trial discharged.

Present, BURKE, GRIMKE, WATIES and BAY.

Charleston, Feb. 1796.

MARY WELLS, widow and relict of ROBERT WELLS, deceased, *against* THOMAS MARTIN.

The widow of a man who was banished from the state, and whose estate was confiscated by the act of 1782, for adhering to the *British* in the course of the revolutionary war, is notwithstanding entitled to her dower in all his lands, &c.

UPON application to the court for a writ, for the admeasurement of dower, pursuant to the directions of the act of the legislature.

The present was an application on the part of Mrs. *Wells*, the widow of *Robert Wells*, formerly a bookseller and stationer in the city of *Charleston*, for her dower in sundry houses in town, and tracts of land in the county, of which her husband was seised and possessed in his life-time, and during her coverture.

It was admitted, that Mr. *Wells* in his life-time had joined the *British* standard, during the revolutionary war, and had adhered to the enemies of *America;* in consequence of which his person was banished from the state, and his estate confiscated by an act of the legislature; and that Mr. *Martin*, the defendant, had purchased one of the lots of land, which formerly belonged to him in *Charleston*. He, therefore, disputed her claim of dower in the house and lot he purchased, which brought the question fully before the court, whether, under these circumstances, she was entitled to her dower or not?

The case was very fully argued by Mr. *Edward Rutledge*, on behalf of the demandant, and by *Desaussure*, *Ford*

and *Johnson*, on the part of Mr. *Martin*, or rather on behalf of the state, which had guarantied Mr. *Martin's* title.

Wells v. Martin.

In the course of these arguments, almost all the old doctrines of forfeitures and attainders for treason and rebellion, were fully gone into and investigated on both sides; but as they were very long and uninteresting, (at the present day,) they are not incorporated into the report of this case, and the more especially, as not only the constitution of the *United States*, but the constitution of this state, and those of all the other states in the union, have forever excluded the idea of bills of attainder, or *ex post facto* laws; as utterly inconsistent with the principles of public justice, and the rights of innocent unoffending individuals. For these reasons, the opinion of the court only is subjoined, which was delivered by Mr. Justice BURKE, to the following effect:

That the judges had considered the question, and were unanimous in opinion, that Mrs. *Wells* was not deprived of her right to dower, either by the common law, or by the act of confiscation. By the common law there was no forfeiture for treason, till after trial and conviction, and the judgment of the court pronounced against the offender. It was one of the consequences which resulted to the crown from such conviction and judgment; but until that took place, and was recorded, the crown had no right; but, when judgment of death, or sentence was once pronounced against the offender, the immediate consequence by the common law, was attainder: he became attaint, or in other words, put out of the protection of the law. The further consequences of attainder were forfeiture and corruption of blood, by which a man forfeits to the king, all his lands and tenements, which for ever afterwards become vested in the crown.

No forfeiture at common law, for treason, till the offender is convicted and judgment pronounced against him. Then and not till then, he becomes attainted, which works the forfeiture.

4 *Black.* 373, 374.

That the common law was of force in *South Carolina*, and formed by far the greatest and most important part of her system of jurisprudence.

Wells v. Martin.

That Mr. *Wells* had never been called upon to answer for the offence of treason, in any court of competent jurisdiction, consequently there never was any conviction or judgment for that offence against him. He never became *attainted*, so as to incur the penalty of forfeiture of his lands to the state, agreeable to the rules of the common law. It was clear, therefore, that his widow's claim of dower remained unimpeached at common law.

That the statute regulations of the state, were properly to be considered only as supplementary to the common law, which was not to be altered by construction or implication, but by express terms. There was nothing, however, in the act of confiscation (severe as it was) which amounted to an attainder, or which expressly altered the common law in this particular. There was nothing in the act, which declared Mr. *Wells* guilty of treason or rebellion against the state. His name, to be sure, is on the list No. 1. annexed to the act; the preamble of which recites, "that it would "be impolitic and unwise to afford protection to those per-"sons," &c. and then it goes on and declares them for ever banished from the state, and their estates confiscated to the public, &c. And although the act vested his estate in the public, and authorized commissioners to dispose of the same, yet there is a clause reserving the rights of individuals, having any prior claims; as judgments, mortgages, marriage settlements, and the like, &c. The right of dower, it is true, is not mentioned in this proviso in the act, but then it is a common law right, which has a preference to judgments, mortgages, or any other incumbrances made or suffered by the husband in his life-time. It is paramount to all the other kinds, of what nature soever they might be, and it is given not by the act or curtesy of the husband, but by operation of law; it is a claim of the highest nature known in law, and one which the courts of justice have ever held sacred. He then mentioned the case of Mrs. *Mongin*, brought up from *Beaufort* district, in the year 1789, whose husband had been put on the confiscation list in the same manner as Mr. *Wells*, in which it was deter-

See Mrs. *Mongin's* case in dower. *Bay's Rep.* vol. 1. p. 73. *Riley's* edit.

mined by GRIMKE, WATIES and DRAYTON, then present, that the right of dower was a common law right, which the widow was entitled to, and which was in no wise impeached by the confiscation act.

Wells v. Martin.

Same point decided in the state of *New-York*. *Johnson's Cases*, vol. 1. p. 27.

It was therefore ordered, that a writ for the admeasurement of dower in the premises in question, should issue to commissioners, pursuant to the directions of the act, &c.

Present, BURKE, GRIMKE and BAY.

WILLIAM PAYNE, Indorsee of two promissory notes of hand, *against* PETER TREZEVANT.

Charleston District, 1796.

UPON a motion to set aside a verdict, and grant a new trial, on the grounds that the finding of the jury was against law, evidence, and the opinion of the judge, before whom the cause was tried.

A note of hand usurious between the original parties to the transaction, is absolutely null and void even in the hands of an innocent indorsee, though the holder may recover against an indorser, on a count for money had and received.

A broker who negotiated the business between borrower and lender though the payee of the note is a competent witness to prove the usurious transaction. Sending notes into market, under pretence of sale, to raise money, is a shift to elude the statute, *if the money is to be returned*. Wherever a return of the money is contemplated by the parties, it will constitute a loan and not a sale.

This was an action on two promissory notes of hand, the one indorsed to the plaintiff, for 580*l.* and the other payable to him, for 27*l.* 1*s.* 4*d.* sterling; tried by a special jury in *Charleston*, before BAY, J. in *July*, 1796, to which there was a plea of *non assumpsit*, and another of the statute of usury. The report of the presiding judge was as follows:

That on the trial of the cause, Mr. *House*, a broker, was called to prove the usurious transaction in its origin; but he was objected to by Mr. *Desaussure*, on two grounds: First, that he was payee of the notes, and had indorsed them, in order to give them circulation. It was evident therefore, he said, that he was a highly interested witness in

Payne v. Trezevant.

the question before the court: and secondly, because he was called upon to invalidate a security, which he had given; and that an indorser of a note, independent of the question of interest, could not be permitted to prove the notes void, which he himself had indorsed, as it was very clear, if the notes were found to be usurious, he never would be liable to pay them: and relied upon the case of *Walton and others* v. *Shelly*, 1 *Durn. & East*, 296. as in point.

Pinckney, for defendant, thought the objection in this case, rather went to the credibility, than the competency of the witness; that he was in no wise interested in the *event* of this suit, one way or the other, and might be well compared to an insurance broker, who had underwritten a policy of insurance, who is a competent witness in an action on the same policy, against those who underwrote before him. 3 *Durn. & East*, 27. On another ground, he said, he ought to be received from the *necessity of the case*, otherwise the statute against usury would become a dead letter. Those kinds of transactions, he said, were generally done in so secret a manner, for the purpose of raising money, that unless brokers or those persons entrusted with the management of these kinds of concerns, were admitted as witnesses, the practice of usury would scarcely ever be developed or found out.

4 *Burr.* 2251. 2256.

After hearing arguments upon both sides upon this point, the judge ruled, that Mr. *House*, the broker, was a competent witness. That the defence in this case was not a common law defence, and to be governed by common law rules of evidence alone: but it was a defence created by statute, which was a transcript of the statute of *Anne*, and was a remedial one, to prevent usurious practices; and therefore ought to have a liberal construction. That by the tenor of this act, the defendant himself was declared to be a competent witness, contrary to the rules of the common law, to prove the usury. And if the act made the defendant a competent witness in his own cause, then surely there could be

no solid objection to third persons, who could not possibly be more interested in the *event of the suit itself*, or in the *determination of the question*, than the defendant. Therefore, the ground of interest being entirely done away by the terms of the act itself, there could be no objection to the witness on that account.

On the ground of necessity, he was of opinion that he should be admitted. For if a broker, through whose hands these negotiations pass, was refused to be admitted, it would really render the act a nullity. The borrowers and lenders are seldom known to each other; they have no communication together on the subject; so that there is not one borrower in twenty who could swear that the whole sum mentioned in the bond or note was not paid down or advanced by the lender at the legal interest. It is only, therefore, through the broker that the real truth of these kind of transactions can be established in a court of justice.

Mr. *House* was then sworn for defendant, and he proved, that some time in the month of *December*, 1794, he was applied to by the defendant to raise him 500*l.* on loan for four months, for the use of which he would give 80*l.* at the rate of four per cent. a month; and would also deposit, as a collateral security for repayment of the 580*l.* the principal and interest, at the expiration of that time, to the lender, a *Georgia* certificate which he then held for 2,000*l.* sterling. That he, the witness, knowing that Mr. *Moses Sarcedas* was at that time in the habit of lending money, went to him, and asked him if he would advance the 500*l.* to the defendant, for the time and upon the terms before mentioned, to which he agreed. That the witness then went back to the defendant, and got the note, payable to himself, for 580*l.* sterling, and the certificate of the state of *Georgia* for 2,000*l.* sterling as a collateral security, which he delivered to *Sarcedas*, who paid him 500*l.* sterling, and gave him a receipt for the *Georgia* certificate for the 2,000*l.* which he engaged to re-

Payne v. Trezevant.

turn at the end of the four months, upon the payment of the 580*l.* sterling, which money and receipt he went immediately afterwards and delivered to Mr. *Trezevant*, the defendant. That this 580*l.* was exclusive of commissions.

Moses Sarcedas was the next witness called by defendant, and he confirmed the testimony of Mr. *House*, as far as respected the transactions between them two. That he was applied to by Mr. *House*, on behalf of Mr. *Trezevant*, to lend 500*l.* and was offered a note for 580*l.* for the use of it for four months, to be secured by a *Georgia* certificate or indent for 2,000*l.* sterling, which he agreed to. That the receipt now produced and shewn him was the one he signed and delivered to Mr. *House*. That he kept the note for 580*l.* for three months, together with the indent, and then passed them both over to one *Richard Dennis*. The note was payable to Mr. *House*, but was not indorsed by him till after he had passed it to *Richard Dennis*; then he got Mr. *House* to indorse it, who was only a mere agent in the business. He relied on the defendant, and the security of the indent. That after the note became due, it was renewed for one month, for the same sum, 580*l.* and another note for 27*l.* 1*s.* 4*d.* was given for forbearance money for that month; and these are the notes on which the present suit was brought. That he, *Sarcedas*, owed Mr. *Payne* about 300*l.* on a purchase of lands, and upon his order to *Dennis*, and on his paying *Dennis* 700*l.* the original note and indent were delivered to the plaintiff, Mr. *Payne*, by *Dennis*; but he thinks Mr. *Payne* did not know that the indent had been lodged as a collateral security for the note.

N. B. The receipt was produced and shewn to him.

William Freeman, a clerk in the branch bank of the *United States*, produced the bank book, by which it appeared, that Mr. *Payne* had lodged Mr. *Trezevant's* note, dated in *December*, 1794, for 580*l.* for collection, in the month of *April*, 1795, which not being paid, was returned to him. And that on the 23d of *May*, 1795, Mr. *Payne* again lodged defendant's two notes in the branch bank for collection, one for 580*l.* and another for 27*l.* 1*s.* 4*d.* which

he supposed were the notes on which this action was founded, as they were returned to him on non-payment, and corresponded in sums, and nearly in dates, according to the times they had to run.

On the part of the plaintiff, *Richard Dennis* was called as a witness, who confirmed the testimony given by *Sarcedas*, that the note for 580*l.* dated in *December*, 1794, had been passed to him, with the *Georgia* indent for 2,000*l.* as security, as mentioned by *Sarcedas;* and that in consequence of an order from *Sarcedas*, he delivered them both over to the plaintiff, Mr. *Payne*, upon his paying him 700*l.* which he received, but does not think Mr. *Payne* knew that the indent had been lodged as a collateral security for the payment of the note.

At this stage of the evidence, it came out, that Mr. *Payne* had sold this *Georgia* indent for 800*l.* sterling, and that the real object of the suit was only to recover from Mr. *Trezevant* as much on these notes as would fully pay him up what *Sarcedas* owed him, at the time when he gave the order on *Dennis* to deliver up the note and indent, about 200*l.* sterling, together with interest, *Sarcedas* having in the mean time become insolvent.

Charles Nowell Simons, a broker, was also called by the plaintiff, who swore, that it had been a very customary thing in *Charleston*, ever since the establishment of the banks, to send notes into the market for sale, and that these were not considered as loans, but sales of notes; as much as old bonds had been for one-half, or state indents at one-third.

Here the testimony closed on both sides.

For the plaintiff, several grounds were taken to the jury: 1st. That this was a sale of a note, and not a loan; and even if it was not a sale, then, 2dly. That this was not a usurious transaction between defendant and *House* originally; it was fair in its creation, and lawful as between these two parties. As Mr. *Trezevant* had a right to make this note payable

Payne v. Trezevant.

this proposal to the broker, and by his taking a receipt for the return of the indent which was lodged as collateral security, upon repayment of the 580*l.*; all which evidently evinced that 80*l.* was offered and accepted for the use of 500*l.* for four months, from the lender of the money.

3dly. That as to innocent holders, if the plaintiff in this case ought to be considered as such a one, as to the note for 580*l.* it made no sort of difference, as far as it regards the drawer of the note. For the law is clear, that all notes given for gaming debts, on usurious contracts, and those given for base considerations, at common law,(*a*) were all void in their original creation, as much as forged notes, into whose hands soever they might afterwards come. And although an innocent indorsee or fair holder might recover from an indorser from whom he received it, on a count for money had and received, yet against the drawer of such note he has no remedy.

(*a*) *Bell* and *Wood's* case, *Bay's Rep.* vol. 1. p. 249. *Riley's* edit.

The Judge, in charging the jury, told them they were bound by the act of the legislature, enacted by the supreme authority of the state; and if a jury was justifiable in disregarding any one act, they might refuse to be bound by any other act or law which did not accord with their own opinions; and thus the fixed and stable principles of law would in future be obliged to give way to the fluctuating and uncertain opinions of juries.

That the act in question made all usurious contracts void; and that the evidence in this case brought the usurious transaction between the original parties, borrower and lender, so immediately and directly under the act, that it was impossible for them to wink so hard as not to see it. That the pretence of sale set up was a mere shift or colourable pretext, to elude the statute.

It was true, he admitted, that a man having an absolute right and power over his own property, might sell or dispose of it upon what terms he pleased, or even give it away, if he thought proper, where it was not to defeat creditors. And hence it was, that soon after the revolutionary war,

Payne v. Trezevant.

bonds and notes, and state indents, when there was little or no specie in the country, had been sold and disposed of for one-half of their nominal values, at 100 per cent. discount, and many much lower, to an incalculable amount. But all those were real sales, not shifts to raise money. That every *loan* contemplated a return of the money at some given or fixed period; whereas a sale was an absolute, irredeemable transfer, for valuable consideration, never to be returned. Thus there was a marked difference between them; the former came under the act, the latter the act had nothing to do with. In this instance, a return of the money was in contemplation of both borrower and lender, and the 2,000*l.* indent was lodged as a collateral security for the *return of the money*, with the *usurious interest*; therefore there could be no doubt but that this was a loan, and not a sale, whatever might be the pretences to the contrary; and being so, it was clearly, in every point of view, a usurious transaction.

1 *Will.* 291.

Ibid.

Cro. 507. *Amb. Rep.* 57. 2 *Str.* 1243. *Lofft*, 598

But it has been said, Mr. *Payne* was an innocent holder, for valuable consideration; he had no concern in the original transaction between the defendant and the broker. This does not in the least alter the case. For if the bargain was in its origin usurious, *no circumstances afterwards between intermediate parties, however fair or legal*, as between *them*, will ever give efficiency or validity to a note or bill, so as to charge the drawer. *Doug.* 715, 716. 1 *Term Rep.* 300. For if it was once permitted to an indorsee to recover on a usurious note, the lender could always pass away these notes or bills, either *bona fide* to one to whom he is indebted, or colourably to some secret partner in the business, and by these means (as has been very properly observed) the statute would be eluded. But Mr. *Payne*, the present plaintiff, is not without his remedy, for although the note is void against the drawer, he has his remedy against the indorser, or person from whom he received it, in an action for money had and received to his use; and if the negotiation was fair between them, upon this equitable ground his remedy would

Payne v. Trezevant.

remain unimpeached. Besides, it was the usage and custom of merchants to take notes and bills upon the credit of the indorser, rather than the drawer, who might be unknown, so that he was not remediless upon the present occasion.

The cause took up two days in the examination of witnesses, and in the arguments of the counsel, and on the morning of the third day, the jury brought in a verdict for the plaintiff with interest and costs of suit.

The present was therefore a motion in the constitutional court of appeals, to set aside this verdict, and for a new trial, on the grounds, that the finding of the jury was against law, evidence, and the direction of the judge who tried the cause.

Upon the argument for and against this motion, nearly the same points were taken which had been urged before the jury, only the court told the counsel on the part of the defendant, they might reserve themselves for the reply to the plaintiff, if the court should think it necessary.

On the part of the plaintiff, all the grounds which had been taken at the trial, were again reargued; and one counsel on the part of defendant was permitted to answer those who had gone on, on behalf of the plaintiff. After which, the judges were unanimously of opinion, that the verdict should be set aside, and a new trial granted, without costs.

The Court observed, that at the threshold of this cause, the judge who tried it, had very properly admitted the broker who negotiated this business between the borrower and lender of the money, to be admitted as a witness, under the act. And that from his testimony, as well as from the testimony of *Sarcedas*, and the clerk at the bank, usury was stamped on every feature of the transaction between

the original parties. If so, then admitting Mr. *Payne* to have been an innocent holder for valuable consideration, of the note for 580*l.* (though he could not be considered as such for the small note for 27*l.* 1*s.* 4*d.* for one month's forbearance money,) yet, as it was absolutely void in its creation, he never could recover against the drawer. That the authorities quoted on the trial, and many others, are all clear on that point. That the jury had found against this clear and positive testimony, as well as against a public law of the state, and the clear opinion of the judge who tried the case, upon all the points, as reported by him to this court. That it was the duty of this court, whenever the juries of the country will take upon them to disregard the laws of the land, and clear and indubitable testimony, to set aside their verdicts, *toties quoties*, &c. until they can get twelve men firm enough to defend and support our legal institutions. Otherwise, the fluctuating sentiments of juries will prevail against the stable principles of law.

Let the rule for new trial be made absolute, without costs.

All the Judges present.

N. B. This cause was never brought forward again.

THE STATE *against* BRYAN CONNOR.

Where a man is convicted of an infamous offence by a jury, and afterwards moves for a new trial, or in arrest of judgment, he is no longer bailable; for the community has no other security for the punishment of a man for a *crimen falsi*, than the four walls of a prison.

Though in minor offences, such as assaults, batteries, &c. &c. it is usual to admit persons after conviction, to bail, to appear at the constitutional court of appeals, in cases where motions for new trials, or in arrest of judgment are made, and to abide the final judgment of such court.

UPON an indictment for forgery at common law, by altering the date of a receipt.

The defendant in this case was convicted of the offence, on very clear testimony, and as soon as the verdict was recorded, the *Attorney-General* (as is usual on such occasions) moved the court that he might be taken into custody, and committed to close prison; (having been out on bail before;) but as soon as he heard the verdict, he slipped out of court through the crowd and got off, before the sheriff or his officers could lay hold of him. On the meeting of the court next morning, Mr. *Holmes*, his counsel, moved that he might still be continued on bail, until a motion he had to make before the constitutional court of appeals could be argued in his favour, in arrest of judgment, which he then gave notice he would bring forward before the judges, at the next meeting of that court, as also a motion for a new trial.

In support of this motion, Mr. *Holmes* contended, that if the defendant was bailable originally, he was still entitled to this privilege, until the final decision of the court of appeals was known upon this case. That a conviction by a jury was not final and conclusive in a case of this kind. That it was possible a jury might find without evidence, or, contrary to evidence; that some of the jury might be prejudiced, and carry their prejudices with them into a jury box. It sometimes happened that even the court suffered irregular, or perhaps illegal testimony to be given to a jury. The constitution of our country had therefore wisely established another, and higher tribunal than this court, for the purpose of investigating and determining all those points, and ordering new trials in all such cases. He further said, that in some cases, the indictment might be faulty, and not so framed as to embrace the defendant's case, which formed a good ground for a motion in arrest of judgment, on principles of law. This also was another point for the con-

sideration of the court of appeals, who had a power to quash such indictment, and discharge the defendant. To confine a defendant, therefore, in prison, without bail or mainprize, after the finding of the jury, might and often would deprive him of the means of pursuing all or any of these constitutional modes of redress, which had been so wisely provided on his behalf.

The *Attorney-General*, in reply, observed, that there was a wide difference, between bailing in cases bailable before conviction, where the guilt or innocence of a man was doubtful; and continuing bail in cases after trial and conviction, where the stamp of guilt was fixed upon a defendant by the finding of a jury. That however the presumption of law might be in favour of a prisoner's innocence before trial, and such he confessed was the humanity of our law, yet, it could no longer remain so after trial and conviction. The presumption of law then was, that he was guilty; which excluded the idea of bail, especially in all cases where infamous or corporal punishment was to be inflicted on the offender.

That the defendant in this case had been convicted of a *crimen falsi*, which calls for infamous punishment; one for which if he had been indicted under the statute, and found guilty, his life must have paid the forfeit. That nothing but the four walls of a prison was a sufficient security to the community for the safe keeping of such a man, till he receives his punishment, as an example to others, the great end of our criminal law. He admitted, that there was another and higher tribunal than this court, to which the defendant might appeal, either in arrest of judgment or for a new trial. But every day's experience shewed how often this inestimable privilege was abused, under frivolous motions on trivial grounds for the purposes of delay, in order to give offenders an opportunity of going off with impunity, or gaining time to evade the justice of the country. He was well aware, he said, that the judges could not, and never would attempt to deny a prisoner this right when demanded, where he was entitled to it; but it was

The State v. Connor.

their bounden duty to see that under pretence of prosecuting this right, they did not elude the penalties of the law for offences. Hence it had been the invariable practice in all cases where infamous or corporal punishment was to be inflicted, to commit to prison, till the case could finally be determined by the constitutional court, and in cases of aggravated assaults and batteries, or trespasses, &c. to order much higher and better security to be given by offenders of this latter class, than had been given to answer to the charge originally, that they would personally appear before the judges at the court of appeals, to receive and abide the judgment of that court in the cases submitted to them. By this means, convicted persons of every class of offenders from the highest to the lowest, had this great advantage of being heard by the judges of the land, upon all points or matters of law, in the dernier resort, and the community had its security for bringing offenders to justice, without the one escaping with impunity, or the other being robbed of its object of just chastisement.

The presiding judge laid down the rule in such cases to be this. That in all dubious cases, (under the degree of treason or felony, plainly set forth in the warrant of commitment,) as long as it was uncertain whether the party was guilty or innocent of the charge alleged against him, such was the humanity of the law, that he ought to be bailed. But when a prosecution was so far advanced, as to establish the guilt of the party accused by a conviction of the jury, the probability of innocence no longer existed; on the contrary, the law would and ought to presume him guilty. The discretionary power of the court then ceases, in all cases where infamous corporal punishment is or ought to be inflicted on the accused person, found guilty of the offence.

That from the very nature of man, who was not lost to all shame, there was nothing he would not forfeit of a pecuniary nature, rather than suffer infamy and disgraceful punishment. Unfortunately, the welfare of society called, in some cases, for such examples, to prevent the repetition

of offences. In all such cases, therefore, no bail could, or ought to be taken or continued. The defendant must stand committed. There could be no other sufficient security to the community, until his case can ultimately be decided by the constitutional court of appeals. Though it had been usual in cases of assaults, batteries and misdemeanors, where only fine or imprisonment was to be the punishment, to admit persons convicted of those minor offences to bail, for their appearance at the constitutional court, where motions for new trial or in arrest of judgment were made on their behalf, to abide the final determination of such appellate court, which additional bail was generally proportioned to the nature and circumstances of the case, as appeared upon trial.

The motion was therefore overruled, and the defendant ordered into the sheriff's custody.

At the next meeting of the constitutional court of appeals, the two motions in arrest of judgment and for a new trial, were argued by Mr. *Holmes* on behalf of the prisoner, and opposed by the *Attorney-General;* but as there were no sufficient grounds to support either of them, they were both dismissed.

After which, the defendant was sentenced to fine and imprisonment, by the judge who presided on the trial in the circuit court.

On this occasion the judges took an opportunity of expressing their opinions, in favour of the refusal of the circuit court, to admit a defendant to bail after his conviction, in a case so highly criminal; but admitted the necessity of an exercise of a discretionary power, even after conviction, in cases for lower offences, to bail for the appearance of offenders at the constitutional court of appeals, to abide the final sentence of that court.

Present, BURKE, GRIMKE, WATIES and BAY.

Charleston District, October, 1796.

ROBERT LINDSAY and others, proprietors of lots on *East Bay*, in the city of *Charleston*, *against* THE COMMISSIONERS, for making the new street there, and for assessing the owners of lots to defray the expense, &c. &c.

A prohibition will not lie against commissioners acting in obedience to an act of the legislature in laying off a new street in *East Bay*, in the city of *Charleston*, although no compensation has been made to the lot owners, over whose soil, the same is to pass.

UPON a motion for a prohibition to restrain the commissioners from making the said street, and assessment on the lot owners to defray the expense.

Mr. *Desaussure*, on behalf of the applicants, stated, that they were the owners of the soil over which this new street was to pass, and also owners of the lots on the *Bay* to the eastward and westward of the said intended new street, and therefore prayed the court to grant a prohibition to restrain the commissioners, appointed by a late act of the legislature, from proceeding in this undertaking on the following grounds, viz:

1st. That the act authorizing the said commissioners to take away their freehold for public uses without their consent, on full compensation being made to them, or trial by jury, was unconstitutional and unjust.

The legislature of the country is vested with the power to pass laws for laying off roads and highways, in every part of the state: and to appoint commissioners to see them made and kept in repair, wherever they may think convenient and proper, without any compensation to the owners of the lands through which they may be run.

2d. That even supposing the commissioners had the power under the act to lay off and carry this new street over their lots, they had exceeded their powers by making unreasonable assessments on the adjoining lots, which they were about to levy and collect, without due authority for that purpose.

1st. The act under which they pretend to derive their authority, was passed in *December*, 1795. It enacts, "that "the city council of *Charleston*, shall have power to appoint "three commissioners to run out and lay off this street, and "to assess the owners of lots near or adjoining to it, in

Every freeholder holding lands under the state, holds them upon condition of yielding a portion of them, when wanted for the public roads and highways; and the state has a right to appropriate the same, as a part of its *eminent domain*, to public purposes for the general convenience of the citizens of the state. And this is not against *magna charta*, but a part of the *lex terræ*, which previously existed, before it was promulgated.

" proportion to the benefit they were likely to receive by it." Under this authority, the city council proceeded to nominate and appoint *William Sommersall*, *John Champneys* and *John Mitchell*, Esquires, the three commissioners, for carrying into effect the intentions of the legislature by laying off and completing the said street, and making the contemplated assessment.

Lindsay and others v. Commissioners.

That the said commissioners, in pursuance of the trust reposed in them, in the month of *April* last, proceeded to lay off the said street and to make the assessment on the lot owners; some at 40 shillings sterling, some at 20 shillings sterling, and others at 15 shillings sterling per foot. That the rule laid down by them was to assess the water lots to the eastward of the street at 40 shillings, because they were the most valuable, running down into the channel, and the lots on the west or inner side of the street at 20 shillings a foot, as they were less valuable than the water lots, and not so likely to be benefited by the street, as the lots on which wharves could be built and extended out so great a distance. That in the month of *June* last, the proprietors of those lots remonstrated to the city council against these assessments, as unreasonable and unjust, and greatly disproportionate to the relative value of the lots; especially as the water lots could not be of any value whatever, but at an immense expense to the proprietors, by running out and building strong and expensive wharves, while the inner lots would become valuable at little or no expense: and therefore prayed relief from that body under whose direction the street was laid off; reserving, however, every right of seeking redress which the law and constitution gave them, as well for compensation for the land, as against the unreasonable assessment.

In consequence of this application, the city council reduced the assessment on the water lots down to 30 shillings a foot, and advanced on the inner lots west of the street 50 per cent. so as to put the whole upon the same footing; but that part of the memorial presented to them,

Lindsay and others v. Commissioners.

praying for a compensation for the soil, they postponed *sine die.*

He then stated to the court, that the applicants meant to rely more particularly, as the real grounds for the prohibition in this case, *on the deprivation of their freeholds without compensation, through the intervention of a jury*, than on the unreasonableness of the assessment, which, however, they still thought too high; and for this purpose quoted the 9th article, 2d section, of our state constitution, which declares that, "no freeman of this state, shall be "taken or imprisoned or *disseised of his freehold*, liberties "or privileges, or outlawed or exiled, or in any manner "destroyed or deprived of his life, liberty or property, but "by the judgment of his peers, *or by the law of the land;*" and the 6th section of the same article of the said constitution, declares, "that the trial by jury shall be for ever in-"violably preserved."

This act of the legislature, he contended, was in direct violation of these great and fundamental principles of the constitution, and had invaded the right of freehold, and disseised the owners thereof, without a trial by jury, or judgment of their peers, against the law of the land; it therefore became the duty of the judges who were the constitutional guardians of the rights of the people, to declare this act as far as it deprives the owners of their freehold estates without compensation, null and void. He then relied upon and submitted to the judges, the opinion of the federal court in the celebrated *Wyoming* case, as delivered by Judge *Paterson*, in which it was determined, that the legislature of *Pennsylvania* "had no right or power to pass "a law to determine or take away the right of one of the "contending parties to a freehold, and give it to another." So also in the case of *Middleton* v. *Bowman and others*, tried in *June*, 1792. "Where an act, passed in *South Ca-*"*rolina*, in 1712, was offered in evidence confirming a tract "of land in the younger son of one *William Cattell*, then "deceased, to the prejudice of the elder son, who was his "heir at law." Our state judges determined that the same

See page 27, of the report of that case and the opinion of Judge *Paterson.*

was null and void, and they refused to admit it in evidence to prove a link in the chain of title derived through the younger son of *William Cattell*, who had died intestate. After these strong authorities in point, and the clauses in our state constitution, he said, he would not take up the further time of the court upon this ground. Lindsay and others v. Commissioners.

Upon the 2d ground, he observed, that even admitting the right of the legislature to pass the act in question, and to authorize the city council to make these assessments, where the rights were equal on both sides, the proprietors of the lots ought to have had an equal choice of the commissioners who were to make the assessments on their property, whereas the city council had thought proper to appoint them all, which was against every principle of right and justice.

That the commissioners thus appointed had exceeded their powers, for they had not only made the assessment, but had proceeded to levy and collect the sums so assessed.

That this conduct on the part of the commissioners was not warranted by law, for it was a well known rule of law, "that wherever an act of the legislature gives new or extraordinary powers, unknown to the common law, such powers must be strictly pursued." These powers by the act were confined to making the assessment only, yet they have taken upon them not only to impose these burthens, but also to levy and collect them, an authority not given them by the act. That this is a mode of proceeding different from the general law of the land, for even in laying on and collecting taxes for the support of government, the assessments were made by the assessors for that purpose specially appointed, but the taxes are levied and collected by the sheriffs of the different districts, who advertise and give notice according to law. Whereas these commissioners, without any express authority for that purpose, proceed to sell and dispose of estates at their discretion.

Comp. 26. 30. *Lofft*, 442. *Salk.* 547. 555, 556.

Mr. *Holmes*, the city recorder, against the motion, in reply, admitted the law as laid down by Judge *Paterson* in

Lindsay and others v. Commissioners.

the *Wyoming* case in *Pennsylvania*, and also in *Middleton* and *Bowman's* case in *South Carolina*, that the legislature had no authority to interfere between individuals in relation to their private property, and by an act in a short-handed way to change the rights of the parties and to take the property from *A.* and give it to *B.* This, he said, was against both *magna charta* and our own constitution. But the power of the supreme authority of the state to lay off and keep in repair roads and highways, for the public use and convenience of the citizens of the country, was the law of the land long before *magna charta* was ever thought of, or our constitution promulgated. It was a law coeval with civil society and sprung out of the necessities of mankind, when they entered into a bond of union, for convenience and safety, for without public roads and highways, there could be no convenient communication from one part of the country to another, unless men roamed like savages through a wilderness. Hence all nations, at least all civilized nations, had concurred in the exercise of this right of opening roads and highways wherever it was most convenient and proper. In fact, it is a part of the ancient law of the land, recognised by *magna charta* and confirmed to the state by our own constitution. The cases quoted, he contended, had no bearing upon or application to the one under consideration. The act in this case did not take away the freehold of one man and vest it in another; but as a matter of great public convenience to the city, declared that a highway or street should be opened and made from one part of it to another, and authorized the city council, under whose care the affairs of the city by its charter is placed, to nominate and appoint commissioners to carry it into execution. It was, however, a little remarkable he said, that there should be such a clamour about compensation for the soil, over which this street was to run, as it never had been of any use to the proprietors, the tide having constantly flowed over it twice in twenty-four hours, for ages past; and what was more, it never would be of any value, until this street was made. It was the very thing, which would make the

lots adjoining valuable; for this street was intended to connect the commercial parts of the city on *East Bay*, with the rich and valuable part of it on *South Bay*, and was to run along the edge of *East Bay* at low water mark; a communication which had been desired by the inhabitants of that part of the town and their ancestors, for near a century past, and by none so much as by the very men who are now making so much noise about indemnity and compensation. There were no houses nor fences, nor enclosures to be levelled or pulled down; there was not the value of a nail or a plank to be removed out of the way, during the whole space this street was to run. It was as perfectly unoccupied at this day, as any part of the pine barren soil, in the remotest part of *South Carolina*. Yet this useful public work is to be impeded or abandoned, until the proprietors of lots adjoining can make their market, and get a sum of money out of the public, under the specious pretext of compensation for the right of freehold. He hoped and trusted the court would see this case, in its true and proper light, and not suffer the interested views of the lot owners adjoining this street, to frustrate the general convenience of the city.

Mr. *David Deas*, in support of the motion, said, that the unconstitutionality of taking away the freehold, without the consent of the owner, or proper indemnity, was what he meant to rely upon in favour of the prohibition. He admitted, that for great national purposes, as for arsenals, fortifications, or the like, the freehold of an individual might be taken away, provided full compensation or indemnity was made to the owner. He also mentioned the case of the *Isle of Man*, which was annexed to the jurisdiction of the kingdom of *Great Britain* by act of parliament, but full compensation had been made previously to the *Atholl* family; also the case of *Cook*, on opening the street to *Black Fryar's Bridge*, in *Cowper's Reports*, where sundry old houses were pulled down on being paid for; also the act for opening the *Santee Canal*, by which the owners of land

Lindsay and others v. Commissioners.

through which the canal was to pass were to be compensated, &c. All these cases, he said, proved his position, that the power to take private property could only be exercised where full indemnity was made to the proprietors.

The *Attorney-General*, Mr. *Pringle*, on behalf of the city corporation, in reply, observed, that if this motion on the part of the applicants was to prevail in obtaining the prohibition prayed for, it would cripple the legislature in the exercise of one of the most important prerogatives appertaining to the state sovereignty, that of laying off roads and highways for the convenience of the citizens of the country. It was in vain to dissemble, and say it was a mere city regulation, a matter respecting the police of *Charleston*. For if the legislature could not, by virtue of its supreme authority in this case, authorize the laying off a new street in the city of *Charleston*, without a trial by jury to ascertain the value of every man's soil over which the street was to pass, and to fix the compensation that the owner was entitled to, the commissioners of highways, in the different districts throughout the state, could not lay off a new road in any part of the country, without ascertaining by a jury the value of that part of every petty tract of pine barren land through which a public road was to run, or to be opened. And if, in a considerable extent of country, such new road was to go through 100 pieces of land, as many juries must be drawn and summoned, and the value of the land be fixed and ascertained by as many trials, in every one of which, the party would be entitled to an appeal to the constitutional court; not only so, but the same forms and solemnities must be pursued by the commissioners of the roads, with the proprietors of lands, when roads were to be repaired, to ascertain and fix the value of timber to be cut down to make causeys and bridges, &c. and other materials necessary on such occasions. There was no drawing the line on such occasions; either the state must possess this high power and authority, as one of the essential prerogatives of sove-

reignty, or every inconsiderable freeholder in the country could, when interest or caprice urged him to it, thwart and counteract the public in the exercise of this all-important authority for the interest of the community. The consequences would be, that we should very soon have no commissioners to superintend our highways, nor convenient roads to pass along from one part of the country to another, if they were obliged to submit to all this delay and trouble, not to mention the expense attending this endless scene of difficulties they would have to encounter. He had, therefore, taken some pains to investigate this subject, and to trace it to first principles, as well as he could; and as far as his researches had extended, found that this was a fundamental and inherent right, which the supreme authority of every state possessed, and without which the public convenience could not be promoted or sustained; and one which all civilized societies have exercised, since the origin of civil governments.

Vattel, on the right of original appropriation, lays it down, that a state cannot subsist, or administer public affairs in the most beneficial manner, if it has not the *power of disposing, on particular occasions, of the property subject to its authority.* It may, therefore, fairly be presumed, that when a nation *takes possession of a country*, the property of certain things is allowed to individuals *only with this reserve.* The right of disposing of part of the property of individuals for the public good in a state, is what is called the EMINENT DOMAIN. *Vattel*, lib. 1. ch. 20. s. 244. The same author goes on and says, it is evident that this right in certain cases is necessary to him who governs, (or in a republic to those who govern,) and consequently is a part of the *empire or sovereign power*, which is to be placed among the prerogatives of majesty, (or sovereign people.) When, therefore, men submit themselves to this empire, they yield at the same time this *eminent domain impliedly*, even if it is not *expressly reserved. Vattel*, lib. 1. *ut supra*, ch. 20. s. 248. Again, he proceeds and says, that this sovereign

Lindsay and others v. Commissioners.

power or eminent domain is to be for the public good, and it extends to all public places, as *on rivers* and on *highways*, &c. These are *public property for the use and benefit of the community*, and all the members of the community have an *equal right* to the *use* of this common property. But the body of the community only may make such regulations on the manner of *enjoying it, or using it*, as they may think proper; provided that these regulations are not inconsistent with *that equality* which ought ever to be preserved in *a community of property*. And as all the members of a community have an equal right to this common property, so all ought to contribute, either in money or labour, to keep them in order, and fit for use. *Vattel*, lib. 1. ch. 20. s. 249.

Bynkershoek, lib. 2. ch. 15. lays it down, that this eminent domain or transcendant power may be lawfully exercised in depriving individuals of their property, whenever the *public necessity* or *public utility* requires it. He classes "*public* "*ways among the works of necessity*, as they are *indispensa-* "*bly essential* to *intercourse and commerce*." "The emi- "nent power of the state may also take from the proprietors, "against their will, those things without which high roads "cannot be made," &c. &c. He also asserts, "that this "right may be imparted to others occasionally, as to *chief* "*magistrates of towns, cities*," &c. but accedes to the position, "that if houses and lands are taken from individuals, "then adequate compensation should be made," but that this is only to be done in cases where lands are improved and built upon.

Rousseau, in his inquiry into the social compact, (ch. 9.) says, that in whatever manner the acquisition is made, the right which every individual has over his own property is always subordinate to the right which the *community has over all*, without which there would be no solidity in the social bond, or any real force in the sovereign power.

From these eminent civilians, and able writers on the rights of nations, the *Attorney-General* said, we had the origin of this eminent domain, or right of sovereignty, con-

tended for; and which appears to have been coexistent with the formation of civil societies, and without which men from remote and distant parts of the country never could have associated together. By common consent, all mankind who originally entered into and became members of society, seem to have consented to yield up to the sovereign power a portion of their landed property, for these great public conveniences, as a condition by which they were linked together, and connected with each other from remote and different portions of the same community. And from the same great jurists, we have the origin of the superintending care of the sovereign authority over these great high communications through the country, by compelling the inhabitants to keep them in repair and in good order, as often as necessity or occasions may require.

Domat, another great civilian, in his treatise on public law, book 1. tit. 8. s. 1. or p. 381. fo. ed. says, there are two things destined for the common use of mankind; one by nature, such as seas, rivers, sea shores, and banks of rivers; the other by civil policy, (or the universal consent of all men,) such as *streets in towns and cities*, *highways* connecting them with each other, and *market-places* for the sale of the necessaries and commodities of the country. In vol. 2. p. 280. God has given us the use of the seas and rivers, which opens the communication with all the world to us, and makes us acquainted with our fellow men in distant countries. Civil policy has built towns and market-places, and by *roads and highways* they are connected together, and their mutual intercourse promoted and kept up with each other.

Thus it is evident that seas and rivers are the great highways of nations, and public roads the great highways of individuals in every nation, in their mutual dealings and intercourse with towns and market-places, and with each other, in every part of its jurisdiction.

Hence originated the power, which the legislature of *South Carolina* has claimed and exercised, since the days of

Lindsay and others v. Commissioners.

Trott's Laws, No. 31. p. 11.

the lords proprietors to the present day. The first exercise of this legislative authority, for laying off and making roads and highways, we find as far back as the year 1686—7, considerably more than one century ago; and from that time, a continued series of road acts have been passed, session after session of the legislature, down to the passing of the act for laying off and making *East Bay-street*, in 1795, through and across every part of *South Carolina*, for the general convenience of the inhabitants of every district, county, town and parish in it, without respect to persons, or the freeholds or landed property of any of the individuals through whose grounds any of the said roads were to pass or be opened; and yet in no one act ever passed on the occasion, in the whole run of a century, has ever one syllable been inserted about compensation, or assessing by a jury a sum to indemnify the owners of the soil through which any of these roads were to pass. On the contrary, so early as the year 1721, a general road act was passed, which repealed all former acts on that head, and was intended to form one general high road system for *South Carolina*. In this act, after nominating and appointing commissioners in all the parishes and precincts in the then province, the 19th clause of the act authorizes and empowers the said commissioners, or the majority of them, within their several parishes or divisions, *at the equal charge and labour of all the male inhabitants of the said districts, between* 16 *and* 60 *years of age*, to make, mend, alter and keep in repair all such roads, bridges, causeys, creeks, passages and water-courses, laid out, and to be laid out, in the said several parishes and precincts, as they might think proper for public convenience. The act then goes on and authorizes them to appoint overseers, to call out all the male inhabitants between the ages above mentioned, and to contract for building of bridges, and to make assessments on the inhabitants, for defraying the expenses of them, and generally to do all other things necessary for making and keeping them in repair. So far the act proceeds

See *Trott's Laws*, No. 458. p. 375.

in giving the commissioners general powers to make and keep the roads, causeys and bridges in order, &c.

The 24th clause of the act authorizes the commissioners of the different precincts to give directions for leaving *all such trees* standing, on or near the lines of such roads, in every parish, as should be most convenient *for shade to the said roads* or paths, &c. and in case any person should, after such road or path was laid out, altered and cleared, *cut down any such tree, within ten feet on each side of such road*, every such person should forfeit for each tree so cut down, the sum of *twenty shillings*, to be levied and collected in the same manner as other fines were levied and collected for offences committed on or near said roads.

The 26th clause of said act goes on further, and declares, that if any person or persons whatever, by themselves, slaves or servants, should in any ways or means stop up or obstruct the passage on the roads aforesaid, or hinder, forbid or threaten the said commissioners, their servants or workmen, from cutting down, falling or making use of any timber, wood, earth or stones, in or near said roads, for making, mending or repairing the same, every such person so offending should forfeit the sum of *fifty pounds*, to be recovered by the said commissioners in the district where the offence should be committed, to be applied towards the repairs of the said roads and bridges.

This act, which was passed in the year 1721, with very little alterations or additions, seems to have formed the system by which the commissioners of the high roads in this state regulated their conduct, from the time of its passing until after the revolutionary war, a period of more than sixty years, during which time almost all the great leading roads from one end of the state to the other, in almost every direction, were laid off and established. And there is not one instance on record, and certainly none within the memory of the oldest man now living, of any demand being made for compensation for the soil or freehold of the lands,

Lindsay and others v. Commissioners.

through which any of these high roads were to pass, or any opposition made by any man, or set of men, through whose lands or plantations any of these roads were opened, to any of the road commissioners, or other persons acting under their authority. Every freeholder in *Carolina* submitted with cheerfulness and respectful deference to the different road laws enacted by the supreme authority of the country. And why, it may be asked, was this exercise of authority so long and so peaceably submitted to? Because our ancestors, who, it may fairly be presumed, were as wise, and as keen-sighted, and as attentive to their interests as we are, were well satisfied and convinced that this was one of the inherent prerogatives of the majesty of the people, and a power which the supreme authority of the state had a right to exercise, for the general good and convenience of the whole, and that it resulted from the very nature and ends of civil society, and that mutual intercourse *which from necessity* they were obliged to keep up with each other.

From the foregoing principles of eminent civilians and writers upon public law and national rights, and the early, long and uninterrupted adoption and use of them by our legislatures, and men clothed with the supreme authority of the government, and the ready acquiescence in them by the citizens, this important right has become a part of the *common law* of *South Carolina*, and now forms as much a portion of it, as any other part of the common law system in use at this day.

Use and *prescription* form the common law of every country on earth; for *usages* and *customs* are nothing more than natural truths, founded on the nature and reason of things, arising from their fitness to answer great and beneficial ends and purposes. And hence it follows, that what has been long in *use*, and what has been *observed for a long time*, is in itself useful and just, and becomes a law. And if any law or custom hath been long disused, it is a proof that it has been abolished. *Domat's Treatise on Laws*, ch. 12. s. 3, 4, 5.

If it should be asked, what was the common law of *England*, which we have adopted as part of the common law of this state? it will be found to have originated from no higher source than *usages and customs*. For after the decay of the *Roman* empire, the *Britons* were invaded by the *Saxons*, the *Danes* and the *Normans*. Each of these, in their turn, brought with them their *usages* and *customs* in succession; and from the most useful of all these, intermixed with the original customs of the islanders, the common law of *England* was originally formed, and which has since been matured and improved by the experience and wisdom of ages.

After the revolutionary struggle for the liberty and independence of *America*, in 1788, when all the citizens of this country, were alive to all their rights and privileges, the last general road act was passed by the legislature, composed of the freemen of *South Carolina*, who had as deep an interest in the soil, as the lot owners on *East Bay*, to say no less of them. Into this last act, all the great and leading principles of the act of 1721, were incorporated, which expressly conformed to the ancient regulations which had been so long in use. The 6th clause of this last mentioned act, authorizes the commissioners to *lay out*, *make and keep in repair*, all such *high roads*, *private paths*, *bridges*, *causeys* and *water-courses*, &c. &c. in their several parishes and districts, *as had been laid out*, or *as they should judge necessary*, in the said several parishes and districts. They are by the 7th clause, authorized to call out all the male inhabitants between 16 and 60 years of age, to make and keep the said roads in repair, &c. to make assessments for building bridges, &c. and to levy and collect the same, also all fines and forfeitures for neglects and omissions, &c. The 9th clause empowers them to cut down and make use of such timber, wood, earth or stone, in or near the said roads, &c. for the purposes of making and keeping them in repair, as to them shall seem necessary; and if any person or persons, by themselves or servants, should in any manner, *hinder*,

Public Laws, p. 443.

Public Laws, p. 445.

Lindsay and others v Commissioners.

forbid, or oppose the said commissioners, their workmen or servants, from cutting down or making use of any timber, wood, stone or earth, *in or near the said roads or bridges*, for the purpose of making or repairing the same; or obstruct the passage on the said roads and paths, every such person so offending, should *forfeit the sum of twenty pounds sterling for every such offence*, to be recovered in a summary process, before any one judge of the court of common pleas, to be disposed of for the use of the said roads and bridges.

Public Laws, p. 446.

The 14th clause enacts, that when any such road shall be laid out, altered or amended, the commissioners (if they shall see fit) shall or may give directions for leaving such trees standing, as shall be most convenient for shade to the said road; and if any person shall wilfully or wantonly, cut down or kill any tree, growing within ten feet of the road, every such person should forfeit the sum of *5l.* sterling, to be recovered by warrant from any three of the commissioners. The act of 1788, confirms, (though with higher penalties for offences) the act of 1721, in all its essential parts, both with regard to the higher prerogative right of the state, and the powers of the commissioners.

N. B. The penalties in the act of 1721, were all current money *i. e.* 7 for one, but those in 1788 are sterling money.

Not even the proprietor of the soil, over which a road runs, dare presume to obstruct a commissioner in running a road, or in repairing it, when laid out; or even cut down a tree left for shade to the road, any more than any other man in the community: which shews the sense of the legislature, not only as to the right of laying off roads, but in keeping them in repair afterwards; and that they have ever considered the soil of every highway, when once laid off, *as exclusively belonging to the public*, and no longer to the *proprietor, through whose grounds they are to run.* This primary obligation of every man, to give up a portion of his land for the use of highways, may, with great propriety, be compared to a tax which every man is obliged to pay and contribute for the support of government.

In the charter of the city of *Charleston*, the legislature, in the usual and customary exercise of this eminent domain

which it possessed, gave to the city council the power, among other things, of laying off new streets from time to time as it should think proper, and of keeping old ones in repair within the bounds of the city. In pursuance of which powers, the city council did proceed to nominate and appoint commissioners to lay off the street in question, on *East Bay*, along the edge of low water mark, from the south end of old *East Bay* street, to the east end of *South Bay* street, *in order to connect the south and east parts of the city together*, by a street or convenient communication. The better, however, to complete this work, and to make this street, it was absolutely necessary to raise it as high as the wharves of the city, both on *East Bay*, and those on *South Bay*, which was likely to occasion a very large expense to the city. To ease the city, therefore, in some degree, of this heavy expense, the assessment was authorized on the lots more immediately to be benefited by this new work. Very few of the lot owners complained of this assessment, which was thought reasonable; but the clamour and opposition was made by the large and principal lot owners, who not being satisfied that this pretext alone would effect their purposes, advanced this new claim for compensation for the soil, to be assessed by a jury. The *Attorney-General* said, he called it a new claim, because it was the first time in the history of our country, that ever such a claim was made, as the present one, except in cases, where houses and buildings had been previously erected, which were necessary to be removed before a street could be completed; and in those cases, compensation had uniformly been made.

He observed, that he had gone a little more at large into this subject, than he otherwise intended to have done, on account of the extensive and mischievous consequences, which such a claim would introduce into *Carolina*, if ever it had the sanction of our courts of justice. He therefore, hoped, the court would reject the application for the prohibitions. He said, he would only trouble the court with one word or two more, in answer to the second gentleman who

Lindsay and others v. Commissioners.

spoke in favour of the motion, as he trusted the city recorder had fully answered the leading counsel who had spoken in its favour.

The principle upon which compensation was made for sites for arsenals and fortifications, was, that a considerable extent or space of land, in favourable situations, for the defence or protection of the country was appropriated, *solely for the use of the state* for military men, and as a grand deposit for arms and ammunition, and as places of resort in times of danger, to which the citizens of the country never had access, but when called upon to bear arms. It was but reasonable, therefore, that the proprietors should be paid for such situations, which were appropriated for the general defence of the whole. Whereas in the case of roads and highways, all the citizens had an unceasing and perpetual use of them alike; there was no exclusive appropriations; it formed part of the original social compact, by which one man at first agreed, that his neighbour should have permission to pass over his land, in consideration, that he was to enjoy a similar one, in passing over his neighbour's, which, in process of time, has been matured into that great and convenient system, by which all the highways of a nation are regulated.

As to the *Isle of Man*, that was a kind of little petty *imperium in imperio*, in which the proprietors styled themselves kings of *Man*, and passed laws of their own. It was a sort of independent sovereignty, which injured the *English* trade exceedingly, by forming a nest for smugglers, from every part of *Europe*. So much did it interfere with the trade of that kingdom, that they had it frequently in contemplation to take it by force. But at last, the ministry of *George* I. preferred a compromise for the *sovereignty* and jurisdiction, with the duke of *Atholl*, for 70,000*l.* sterling, and it has ever since been governed by laws enacted by the *British* parliament. But that case bears no kind of analogy to the one under consideration. It had more the appearance of a cession from one sovereign power to another, than an appropriation for public purposes.

Lindsay and others v. Commissioners.

As to the opening of the street in the city of *London* to *Black Fryar's Bridge*; it was extremely proper and just that compensation should be made to the owners of the houses removed out of the way, &c.

A most magnificent bridge had just been built over the river *Thames*, which added greatly to the convenience of the city, and opened a most advantageous communication to the county of *Surry*, on the opposite side of the river. It formed one of the principal avenues to and from this vast city. But before a large convenient street could be opened into the other great avenues in the city, it became necessary to pull down a number of buildings which stood in the way. Accordingly, an application was made to parliament, who passed an act authorizing the lord mayor, aldermen and common council of *London*, to treat with private persons for such houses as were in the way, and the grounds over which the new street was to pass. And in case the proprietors would not sell, then to summon a jury to assess the value of each house and lot; upon tender or payment of which, the soil was to be vested in the corporation for a public highway or street, for the use of the city forever. And if any proprietor refused to accept of the sum so assessed, the money was to be deposited in the bank, for the use of the proprietor or his heirs, &c. whenever they thought proper to accept of it. Here it is to be observed, that no public highway or street had ever been laid out or opened, before the lands had been built upon and improved; it would therefore have been little less than downright robbery, to have taken away these lands and houses from the proprietors, without adequate compensation. But this is very different from waste lands, which have never been occupied or improved, and can form no kind of precedent in such a case. In the case before the court, it was an original appropriation of waste, unimproved land, for the purpose of making a public highway. So that the two cases are by no means parallel with each other. The case of the *Santee Canal*, was the case of a company, who were to receive the

Act passed 29 *Geo.* II. A. D. 1756.

Lindsay and others v. Commissioners.

benefit of a toll, *to their own emolument.* It was made at their own expense and not by the public, and it is kept in repair at their labour and expense only. The public have nothing to do with it. But although the act allowed of compensation to the owners of the land, through which it was to pass, if they thought proper to claim it, yet not an individual in the whole course of twenty-two miles, through whose land the canal ran, has ever made such claim. Indeed they would have been ashamed of it, as their lands were greatly benefited by the canal. This case therefore, like the other cases quoted and relied on, has nothing to do with the present question. He apologized for dwelling so long on so very clear a case; its importance to the community at large would, however, he hoped, plead his excuse.

Judges GRIMKE and BAY were of opinion, that the motion for the prohibition ought to be refused. They considered the act in question as authorized by the fundamental principles of society. That the authority of the state, as laid down by eminent civilians and jurists, to appropriate a portion of the soil of every country for public roads and highways, was one of the original rights of sovereignty, retained by the supreme power of every community at its formation, and like the power of laying on, and collecting taxes, paramount to all private rights; or in other words, that all private rights were held and enjoyed, subject to this condition.

That it was by the means of these roads and highways, that the citizens of the country had a convenient communication from one extremity of it to another; and between the intermediate towns and public places in the interior of it. It was along them also, that the citizens assembled with convenience and despatch in times of danger and alarm, for defence and protection; and along these, the productions of the country were conveyed to a market, and the produce of the soil was rendered valuable. It was therefore a matter of primary importance, that the power of making and

laying off these avenues of great public convenience, and keeping them in repair, should for ever be vested in the supreme legislative body of every nation and commonwealth on earth. That the legislature of *South Carolina*, had exercised this power and authority, from the first establishment of civil government in it, to the present day. They therefore considered it, as much a part of the common law of *South Carolina*, as any other part of that great and valuable system.

That it was neither against *magna charta*, nor the state constitution, but part of the *lex terræ*, which both meant to defend and protect. The so much celebrated *magna charta* of *Great Britain*, was not a concession of rights and privileges, which had no previous existence; *but a restoration, and confirmation* of those, which had been usurped, or had fallen into disuse. It was therefore only declaratory of the well known and established laws of the kingdom.

So, in like manner, the 2d section of the 9th article of our state constitution, confirms all the before-mentioned principles. It was not declaratory of any new law, but confirmed all the ancient rights and principles, which had been in use in the state, with the additional security, that no bills of attainder, nor *ex post facto* laws, or laws impairing the obligation of contracts, should ever be passed in the state. They were therefore of opinion, that so far from interfering with, or contradicting this high and important privilege of the legislature, in laying off highways, they both confirmed and secured it; consequently that none of the cases relied on by the counsel in favour of this motion, had the least tendency to contradict or overturn these principles. They were also of opinion, that the act of the legislature was constitutional and binding, and that the city council were well warranted in appointing the commissioners to go on and finish the street in contemplation. As to the assessments on the lot owners, that point seems to have been given up in the argument, as they relied principally on the compensation for the freehold: and as to the mode of

Lindsay and others v. Commissioners.

collecting them, it appears to be in conformity to the old usage and custom of levying and collecting assessments, for the building and repairing of bridges, prescribed by the ancient road acts, a century ago. Upon the whole, they were of opinion, that there were no grounds for the prohibition, and that the rule should be discharged.

BURKE, J. admitted the power of the state on great and necessary occasions, to appropriate a portion of the soil of the country, for public uses and national purposes; but was of opinion that there should be *a fair compensation made to the private individual, for the loss he might sustain by it*, to be ascertained by a jury of the country.

WATIES, concurred in opinion with BURKE, but went more fully into his reasons. He admitted the right of the state to take the property of an individual, for purposes of public *necessity*, or even for public *utility;* but in exercising this power, it was essential to its validity, *that a full compensation should be provided at the time*, for every injury that the individual might suffer. This appeared to him, he said, to be the construction given by the writers quoted on the part of defendant's counsel, to shew the lawfulness of this power. *Vattel*, b. 1. c. 20. s. 244. expressly says, that "justice demands, that the individual should be recompensed;" and *Bynkershoek*, who was also quoted, explicitly declares the same thing. The common law of *England*, which has also recognised this power, does it always with the same restriction. "The legislature," says Mr. *Blackstone*, "may order a new road to be made through "the private grounds of an individual, and may compel "him to acquiesce in it. But how does it compel him? "not by stripping him of his property, in an arbitrary manner, but by giving him a full indemnification or equivalent "for it. And even this is an exertion of power which it "indulges with great caution." Which is evident in the act of parliament for making a new road from *Black Fry-*

er's Bridge, across *St. George's Fields*. The corporation of *London* is thereby authorized and directed, to treat with the owners of lands that might be taken away by the road, for the purchase of the same; and in case of refusal to treat for the value of the lands taken, the same is to be assessed by a jury; which he said, had a strong similitude to the present case. The road in that case, most probably in some cases enhanced the value of the lands through which it passed, and therefore was productive of benefit to the owners. But parliament thought proper, *by the sacred principle of compensation*, to provide for any possible injury. The rights of our citizens are not less valuable than those of the people of *England:* we have besides a constitution, which limits and controls the power of the legislature, the 9th article of which, declares, that no freeman shall be devested of his property, but by the judgment of his peers, *or the law of the land*. On a former occasion, (in the case of the *City Corporation* against *Zylstra*,) he said, he had gone into a long investigation of the technical import of the words *lex terræ*, and therefore should only state here, that they meant *the common law*, and *ancient statutes* down to the time of *Edward* II. which were considered as part of the common law. This was the true construction given to them by all the commentators on *magna charta*, from whence they were adopted by our constitution. If the *lex terræ* meant any law which the legislature might pass, then the legislature would be authorized by the constitution, to destroy the right, which the constitution had expressly declared, should for ever be inviolably preserved. This is too absurd a construction to be the true one. He said he understood, therefore, the constitution to mean, that no freeman shall be deprived of his property, but by such means as are authorized *by the ancient common law of the land*. According to this construction, the right of property is held under the constitution, and not at the will of the legislature. In what way, then, does the common law authorize the power of taking private property for public uses? "by pro-

Lindsay and others v. Commissioners.

"viding," says Mr. *Blackstone*, "a full indemnification "for it." This is the condition on which the valid exercise of this power depends. But the law under consideration does not provide any indemnification, nor does it make the public responsible in any way for any injury which might be done to the plaintiffs. It has not therefore complied with the terms of the common law, and is not conformable to the constitution. It was urged, however, that no injury could arise to any of the parties complaining, and therefore it was not necessary that the legislature should provide any indemnification. This fact may be so; but it makes no difference in the case. Was the legislature itself to be the judge of that fact? Can it prescribe what terms it pleases for the individual, and determine either the measure of compensation for property taken, or that none at all is due? This would be attributing to it a power which belongs only to despots. And yet even the greatest despots have not always felt themselves at liberty to exercise it in this way. *De Tott*, in his memoirs of the *Turkish* government, mentions a remarkable instance to the contrary, which it may not be amiss to relate on this occasion. The sultan *Mustapha* being desirous of building and endowing a new mosque, fixed upon a spot, in the city of *Constantinople*, which belonged to a number of individuals. He treated with *all* of them, for the purchase of their parts, and they all willingly complied with his wishes, except *a Jew*, who owned a small house on the place, and who refused to give it up. A considerable price was offered him, but he resisted the most tempting offers. His partiality for the spot, or his obstinacy, was stronger than his avarice. All the city was astonished at his rashness, and expected every hour to see his house demolished, and his head upon a pole. But what was the conduct of the sultan? of one who was the absolute master of the lives of millions? He consulted his mufti, who answered that private property was sacred, that the laws of the prophet forbade his taking it absolutely, but he might compel the *Jew* to lease it to him, as

long as he pleased, at a full rent. The sultan submitted to the law. He observed, that we might learn two things from this example of a despot: 1st. That the sovereign power, although absolute, is not at liberty to take away private property and decide, at its own discretion, that no compensation is due; 2d. That the principle of indemnification is deeply founded in natural justice. It was further said in this case, if any injury is done, the parties might have recourse to a court and jury for redress. But whom could they sue? not the commissioners, not the city council; for they would justify under the act. Whom then? why, no one. But suppose they could sue, what would be the nature of the action? It could not be founded on contract, for there was none. It must then be on a *tort;* it must be an action of trespass, in which the jury would give a reparation *in damages*. Is not this acknowledging that the act of the legislature is a tortious act? and can any thing prove more fully, the arbitrary character of the act, than this?

Lindsay and others v. Commissioners.

He said, it was painful to him to be obliged to question the exercise of any legislative power, but he was sworn to support the constitution, and this was the most important of all the duties which were incumbent on the judges. On the faithful performance of this high duty would depend the integrity and duration of our government. If the legislature is permitted to exercise other rules than those ordained by the constitution, and if innovations are suffered to acquire the sanction of time and practice, the rights of the people will soon become dependent on legislative will, and the constitution have no more obligation than an obsolete law. But if this court does its duty, in giving to the constitution an overruling operation over every act of the legislature which is inconsistent with it, the people will then have an independent security for their rights, which may render them perpetual. In exercising this high authority, the judges claim no judicial supremacy; they are only the administrators of the public will. If an act of the legislature is held void, it is not because the judges have any control

Lindsay and others v. Commissioners.

over the legislative power, but because the act is forbidden by the constitution, and because the will of the people, which is therein declared, is paramount to that of their representatives, expressed in any law. As the act under consideration appeared to him to be repugnant to this high will, he was bound to say, that it ought not to have any operation, and that the prohibition should be granted.

As the judges were equally divided in opinion in this case, the applicants took nothing by their motion.

The rule for the prohibition was, therefore, discharged.

October term, 1796.

THE STATE *against* SMITH and CAMERON.

On *not guilty* pleaded to an indictment for an assault and battery, evidence of extenuating circumstances is improper to go to a jury on the trial, but ought to be submitted to the court on affidavits before sentence is pronounced. And in order to compel a witness to attend and give such kind of testimony, (if necessary) the defendant is entitled to a subpœna in same manner as on the trial of an issue.

UPON an indictment in the court of general sessions of the peace, &c. for an assault and battery. Not guilty pleaded.

On the trial of this case, the defendants offered to give in evidence to the jury a variety of extenuating circumstances, which were calculated to lessen the nature of the punishment, but which did not go either to a justification, or to disprove the charge laid in the indictment; which the presiding judge refused to admit as proper testimony to go to the jury on the issue of not guilty pleaded.

On a motion for a new trial, on the ground that the testimony offered should have been permitted to have gone to the jury, it was ruled by all the judges present, that the presiding judge at the trial had very properly rejected such testimony, on the issue of not guilty pleaded, as irrelevant to the point before the jury; but that all such extenuating

circumstances should be submitted to the court, on affidavits, a reasonable time before sentence is pronounced. And in order to guard against a failure of justice, by the non-attendance of witnesses to give testimony of such extenuating circumstances as a defendant may be desirous of submitting to the court on the sentence day, they were further of opinion, that a defendant was entitled to a subpœna, as a matter of right, to compel the attendance of witnesses on such occasions, as well as on trials of issues before a jury.

Present, GRIMKE, WATIES and BAY.

BURKE afterwards concurred.

JAMES SHOOLBRED and Wife *against* The CORPORATION OF THE CITY OF CHARLESTON. *October*, 1796.

UPON a motion to shew cause why a *mandamus* should not issue to compel the corporation to make an assessment on the city, to pay for a house pulled down in order to open *Meeting-street*.

Where an act of the legislature imposes a duty on a corporation, to make an assessment to pay for buildings pulled down to open a street, a *mandamus* will lie to compel a performance of such duty.

Every city, county and parish in the state is obliged to keep the streets, roads and bridges in repair, within its own boundary, and also to defray the necessary expense.

The facts in this case were not disputed. Mrs. *Shoolbred* had inherited through her maternal ancestry a lot of land at the upper end of *Meeting-street*, on which the house in question had been built by one of her ancestors. It was a valuable one, and had several convenient out-buildings attached to it, fit for the accommodation of a genteel family. At the enclosures which surrounded this mansion, *Meeting-street* formerly terminated, before the old fortifications which surrounded the town were demolished, and a street now called *George-street*, which ran off at right angles in a westwardly direction to *King-street*, from the end of *Meeting-street*, formed one of the great avenues leading to and from

Shoolbred v. Corporation of Charleston.

the city. But upon the return of the blessings of peace, after the revolutionary war, when all the fortifications in the rear of the city became useless, and its population had greatly increased, it became necessary, for the accommodation and convenience of the citizens, to open *Meeting-street* from the point where it formerly ended, as it would then form one of the greatest and most convenient communications between the town and country. The buildings in question, however, stood in the way, and without their removal the street could not be opened. An application was therefore made to the legislature, for permission to pull them down and remove them out of the way, in order to run the street through the lot of ground on which they stood, to the unimproved grounds in the rear of them. The legislature, being satisfied of the necessity and utility of opening this street, in the year 1795 passed an act authorizing the running of the street through this lot, and appointing seven commissioners, therein named, to fix upon the compensation which it was reasonable should be made to Mr. and Mrs. *Shoolbred*, for the injury they were likely to sustain by the loss of the buildings and gardens through which the street was to run, to be defrayed by an assessment, to be made by the corporation of the city of *Charleston*, on the inhabitants in general.

This valuation, in pursuance of the powers given by the act, was made by the commissioners, to the entire satisfaction of Mr. and Mrs. *Shoolbred*. But a difficulty arose about the manner of making the assessment necessary to raise the sum requisite, agreeable to the appraisement.

On the one hand, it was contended by the city wardens, that as this new street was continued over the boundary line of the city, through the parish of *St. Philip* and *St. Michael*, for two miles, up to the *King-street* road, and as the inhabitants above the city line would benefit by it quite as much, if not more, than those within the city limits, it was insisted on by them, as well as by a large proportion of the inhabitants, that the assessment ought to be made on the in-

habitants of the parish generally, and not to be confined to those in the city only.

Shoolbred v. Corporation of Charleston.

To this it was answered by the commissioners of the roads and highways for the parish, that they had no objection to open and keep in repair this new road or street from the boundary line of the city, that is, from the north line of *Boundary-street* to the *King-street* road, but that the inhabitants above that line were not obliged by law either to work on the roads or streets, or to contribute to keep them in repair, below the city boundary. That the city of *Charleston*, by its charter, formed a separate and exclusive jurisdiction within itself, and the corporation had the care and superintendance of all the streets, lanes and alleys in the city, and were bound to open and keep them in repair at the expense of the city alone. That it was very much for the convenience, as well as for the ornament and beauty of the city, that this street should be opened, and the obstructions removed out of the way; for which reasons, they contended that the assessment should be made on the city only.

The power of the legislature to pass the act was not called in question, but admitted on all hands; the only matter in dispute was the mode of making the assessment.

The Judges, after hearing counsel for and against the motion, were unanimously of opinion, that the expense should be borne by the inhabitants of the city of *Charleston* alone. That it was a general principle, which had pervaded every part of the state, from its early establishment to the present day, that every county, parish and district throughout the state, should lay off and keep in repair its own roads, bridges and causeys; (except in cases where the counties or parishes were divided by rivers or water-courses; in such cases, the bridges were to be built and kept in repair at the expense of the adjoining counties or parishes;) and as a necessary incident thereto, should defray all the expenses necessarily attending the same.

Shoolbred v. Corporation of Charleston.

That the demolition of those houses was essentially necessary for the purpose of opening *Meeting-street* to the city boundary, and was for the convenience of the city. The money requisite, therefore, to defray the expense, should be raised by a tax or assessment on the taxable property of the citizens within its boundary. That the continuity of the road, and the advantage which the adjoining parishioners were to derive from it, made no sort of difference, as the advantage would be mutual on both sides. This did not, therefore, lessen the obligation of the city to lay open and keep in repair the streets within its own jurisdiction. Our high roads were connected together and continued from the sea coast to the mountains, and through the state from *North Carolina* to *Georgia*, and it might as well be contended, that the man in the remotest part of the state should contribute his quota towards the expense, because he occasionally made use of *Meeting-street*, or any other highway at either extremity of the state. To avoid this inconvenience, the policy of our road laws and highway system had wisely provided against it, and had directed that every separate and distinct portion or division of the state should make and keep its roads and bridges in repair, within its own limits and jurisdiction.

Rule for a *mandamus* made absolute.

Present, BURKE, GRIMKE, WATIES and BAY.

WILLIAM GREENWOOD *against* The Executors of JOB COLCOCK. *October*, 1796.

UPON a rule on the sheriff of *Charleston* district, to shew cause why he did not return the execution of *fi. fa.* which had issued in this case, and also why he did not pay into court the money he had levied thereon.

In sheriffs' sales, where the property is claimed by a third person, the sheriff should return the money into court until the right is determined, and then make his return on the execution according to the decision.

Upon shewing cause, the sheriff stated that the property he had levied on, by virtue of the above execution, was claimed at the time of sale by Major *Butler*, and that his agent, Mr. *Delamotte*, had purchased it in, and held it until the dispute about the right to the property was determined; and, moreover, that Mr. *Delamotte*, the agent of Major *Butler*, had given him, the sheriff, a bond of indemnity for not returning the execution.

In this case, *the Court* was of opinion, that where a sheriff sells property, by virtue of an execution, which is claimed by a third person, not a party to the suit, the rule was, for him to return the money into court to abide the event of the dispute, and then to make his return, conformably to the decision, on the back of the execution. But that it was very wrong, and contrary to every principle of justice, to suffer such party to get possession of the property, or to change the position of the parties by his own act, or to make himself a stakeholder until the right was determined. 1 *Burr.* 23. 29. *Dalt. Comp. Sheriff*, 247. 1 *Keb.* 901.

A bond given to sheriff, to indemnify him for not returning an execution, is null and void by the common law.

The court was further of opinion, that the bond given to the sheriff, by the purchaser in this case, to indemnify him for not returning the execution, was void in law, as it was evidently given to the sheriff to induce him to omit doing his duty, and it is very clear that all such contracts are void. *Powell on Contracts*, 186. 194, 195.

It was therefore ordered, that the sheriff do proceed forthwith to resell the same property at the risk of the pur-

Greenwood v. Executors of Colcock.

chaser, and return the money into court, subject to the future order thereof, when the merits of this claim shall be determined.

Present, BURKE, GRIMKE and BAY.

October, 1796.

HANNAHAN *against* The Executors of HANNAHAN.

Upon entering up a judgment on a *sci. fa.* the plaintiff is entitled to his execution *instanter*, and is not to be delayed 30 days, where service of the original writ was not personal, as in the original suit.

MOTION for leave to issue an execution on a judgment on a *sci. fa.* on the last day of the court.

This was opposed, on the ground that the 12th rule of court, founded on the act for the amendment of the law, directed that no execution should be issued until ten days after judgment, where the service of the original writ was personal; or until the expiration of thirty days after the motion for judgment, when the service of the original was not personal, but left at the defendant's house or place of residence, or most notorious place of abode, as was the case in this suit.

But by the court it was resolved, that the plaintiff is entitled to his execution *instanter*, on a judgment on a *sci. fa.* because, in a cause of this nature, there can be no grounds alleged for surprise or undue advantage, or any thing which could affect the merits of the case, as the defendant had an opportunity of availing himself of every thing of that kind in *the original suit*, which was the reason for allowing thirty days to defendant to move for a new trial, or in arrest of judgment; so that nothing but payment or satisfaction can be pleaded to a *sci. fa.* to revive a judgment, as was determined in the case of *Gibbes* and *Wainwright*, in *September*, 1795. And if the plaintiff has given a year and a day of indulgence after the original judgment, and no pay-

See *Bay's Rep.* vol. 1. p. 453. *Riley's* edit.

ment or satisfaction pleaded, there can be no reason assigned why he should be kept longer out of his money.

Hannahan v. Executors of Hannahan.

The motion was, therefore, granted accordingly.

All the judges present.

ALEXANDER BRODIE *against* The Hon. JOHN RUTLEDGE, Chief Justice of the State of *South Carolina*.

Charleston District, 1796.

THIS case came before the judges in the form of a petition or complaint against the prothonotary, for refusing the plaintiff a writ under the seal of the court of common pleas.

A judge either supreme or subordinate is not liable in an action for damages, for any opinion he may deliver as such; but is liable by impeachment if he is guilty of misconduct.

The petitioner in this case stated in his petition, that having, as he conceived, a good cause of action against the late chief justice, while he sat on the *South Carolina* bench, before his advancement to the chief justiceship of the *United States* for some opinion he had delivered in court, had determined on bringing his action for damages against him, and for that purpose had applied to the different gentlemen of the bar to commence the action, but that they had all refused to be concerned in it. He then stated, that he had resolved on bringing it *in propria persona*, and for that purpose had applied to the prothonotary of *Charleston* district for a writ under the seal of the court, in common form, to call the defendant to answer in damages for the said supposed injury, but that he had been refused such writ, which he said was a denial of justice, and therefore prayed the aid of the court on this behalf, and that the usual process might be awarded him.

It was intimated to the judges, that the petitioner at times was in a deranged situation; but as that was rather a

Brodie v. Rutledge.

doubtful point, they thought it best to declare their opinion upon the subject, lest it might possibly be supposed, that as it concerned one of the members of their body, they had declined giving any opinion as to the prayer of the petition. They therefore gave it as their unanimous opinion, that the prothonotary of the court of common pleas had acted judiciously and properly in refusing the petitioner the process, as he had no cause of action, by his own statement. That it was a well known rule of law, "that no suit will lie against a judge for any opinion delivered by him in his judicial capacity, either supreme or subordinate. But that he was liable for misdemeanors in office, and subject to impeachment for misconduct, if he had misbehaved; of which, however, there did not appear to have been the shadow of grounds on the present occasion.

The petition, therefore, and the motion founded upon it, were dismissed as frivolous and without foundation.

All the Judges present.

Charleston District, 1796.

SIMS WHITE *against* JAMES CHAMBERS.

Battery of a slave is actionable by the master; though the slave himself can maintain no such action.

If a slave is insolent to a freeman, he ought in the first place, to complain to the master or other person having charge of such negro slave, who ought to give him redress. But if the master, or person having charge of such slave, refuse redress, then application should be made to a civil magistrate, who was bound to redress the injury. But he ought not to take revenge by his own arm.

SPECIAL action on the case, for beating the plaintiff's negro man.

It came out in evidence on the trial, that the negro in question, had the care of his master's fishing canoe on *Sullivan's* island, when the defendant went down to the landing place where it was, and said he would take it, and go out fishing in it. The negro told him he could not have it, as

his master had given him orders to let no one take it away, as he was in the constant habit of using it himself, and he expected him down every minute to go out in it. The defendant, however, persisted in taking it away, and the negro in obeying his master's orders in refusing to let him have it, upon which some high words passed between them on both sides, whereupon the defendant struck him a blow with his fist, and then took up a paddle, which was in the canoe, and knocked him down, and afterwards beat him very severely, which laid him up for several days before he was able to go about his master's business again.

It was therefore for this injury done to his servant, that the master brought the present action.

The defence set up by the defendant was, that the negro was insolent to him, and that the beating was not more than proportioned to the nature of such insolent language. And further, that from the evidence offered in this case, the plaintiff could not maintain this action for a personal injury offered to the person of a negro, though it was admitted that if the plaintiff had declared, *per quod servitium amisit*, he might have supported the action for the loss of his labour, but not for any violence offered to his person; for it is this loss of labour, which alone entitles the master to his right of action. That the plaintiff had declared for the personal injury done to his slave, and not for the loss of his services.

Upon the first ground of defence, the defendant alleged, that from the great number of slaves in this country, and their proneness to rudeness and improper behaviour, it was necessary that the freemen of *Carolina* should, at all times and in all places, possess a power to check them, whenever they were disposed to be forward or unmannerly, and to chastise them for insolent language whenever it was offered by them. And unless this speedy and summary mode of redress was allowed, this class of people could never be kept in order and due subordination. And that in the present case, the defendant had done no more than

White v. Chambers.

give the plaintiff's negro a moderate chastisement for a very great degree of insolent and abusive language, which he had given on the occasion.

Upon the second ground of defence, the defendant's counsel contended, that a master could not maintain this action for a violence offered to a servant. A personal action could only be maintained by the party suffering the injury. It could not be transferred to a third person. And for the same reason it died with the party injured: it did not survive to his executor.

3 *Bac.* tit. *Master* and *Servant*, 568. 9. *Co.* 113. 10 *Co.* 131.

It was true, he admitted, that a servant might by the common law maintain an action for a battery, at the same time, that the master brought his for the loss of labour. But in this state, slaves possessed no civil rights. They could support no action in their own rights either by the common law, or any statute in existence here.

For the plaintiff it was argued in reply, that if the doctrine contended for by defendant, was to be established in this state as law, it would place the slaves of the planters and householders, at the mercy of every violent or vindictive man who might choose to give vent to his brutal resentments against this class of people.

That the policy of our laws admitted of slavery, but the wisdom of our laws, at the same time required that the slaves of the country, should have every degree of protection, that their situation would possibly admit of. It was admitted, that they could not maintain actions for injuries in their own rights, so that they could not defend themselves, by civil actions for redress of injuries offered to their persons. But this, it was urged, imposed an additional obligation on the part of their owners to step forward and afford them that protection. That the common law of *England*, from whence we borrowed our common law system, never had contemplated the condition of slavery, and therefore never had provided a remedy for injuries done to slaves. As, however, the laws of our state do allow and

tolerate it, a redress ought to be established in all cases, proportioned to the evil.

It is a well known maxim, that *there can be* no injury without a remedy. Negroes are obliged to obey the orders of their masters in all lawful occupations. If, therefore, any violence or injury is done towards them, while they are fulfilling this duty, reason and justice require that their owners and proprietors should shield them from the unlicensed abuse of their persons, which can only be done in a peaceable way by civil suits, for this offence offered to their masters, through their slaves.

As to the necessity of enforcing due subordination among them, and compelling them to behave with due submission to their superiors, the law had provided a remedy, by application to a civil magistrate, who was authorized, in a very summary manner, to call to his assistance two freeholders, who had a right to order a slave to be chastised in a reasonable degree, to repress all improper conduct on the part of unruly and turbulent characters among them; and that was the line of conduct, which every peaceable citizen should pursue in such case for insolence or improper conduct. And as this was generally done with temperance and cool deliberation, the example was more likely to have the effect, than by a freeman's putting himself upon a footing with a negro, and taking satisfaction with his own arm.

But in the present case the plaintiff denied that his negro had behaved amiss on the present occasion. He had only obeyed his orders in keeping the canoe from being taken away, so that the defendant was the aggressor in the first instance, and as to the ill language alleged from the negro, there was nothing but the bare allegation of the defendant for it, which was no evidence in this court, in this action.

The presiding Judge charged the jury in favour of the plaintiff's right of action in a case of this kind; and also, against the right of an individual's taking satisfaction by his

White v. Chambers.

own arm in the first instance, (unless violence had been offered to him,) before he had applied to the master or owner of such slave, or to a magistrate for redress. And they found a verdict, for *5l.* sterling, and costs of suit.

Upon a motion in arrest of judgment and for a new trial, nearly the same grounds were taken, which had been urged on both sides, on the trial of the issue before the jury, when after argument the court determined, that this action ought to be supported from the necessity of the case, even if there had been no precedent to warrant it. The late chief justice had however informed them, that similar actions had been supported by the king's judges, many years ago, under the colonial administration; and no doubt was entertained by them previous to the revolution, but that it well lay for this injury. Here, they said, were ancient precedents in its support.

Taking it upon principle, there could be no doubt upon the subject. Every injury must have a remedy. This was one of a serious nature and called for redress. If the common law of *England* had tolerated slavery, a remedy would doubtless have been provided by it, for injuries done to that class of people, in all parts of the *British* dominions. In the act of the legislature, however, extending that system to *Carolina*, then a province to *Great Britain*, there is a proviso or exception as to all those parts of it, *which were inconsistent with the particular constitutions*, CUSTOMS *and* LAWS *of this (then) province*, which left an opening for this part of the provincial constitution and custom of tolerating slavery, and every thing relative to the government of slaves in *Carolina*. One part of this custom or law of the then province, denied to slaves civil rights, but then it allowed to their masters or owners, every right for redress of injuries done to their persons, which was necessary to afford them protection. Hence the origin of the right of supporting the action now contended for. And the reason of the thing justified the adoption of such a principle in *Carolina*. The master enjoys the fruits of the labour of his slave. He is

See page 99. of the *Public Laws of South Carolina*.

bound to obey his orders and injunctions, and as obedience and protection seem in the nature of things, to be reciprocal duties, he is bound in return to protect his slave from personal injuries, which can only be done in *a peaceable manner* by suit at law.

Compensation for the bare loss of labour, is not an adequate remedy, because very often an injury offered to a slave, in the execution of his master's commands, is a direct injury offered to the master who gave the orders, or an affront offered to his authority, which would too often lead on to quarrels and bloodshed, if some adequate remedy was not provided for this kind of injury offered to a slave. They were, therefore, all of opinion, that the action will lie by the master, for a battery committed on his slave, which had been sanctioned by precedent, as well as by the natural principles of justice and reason; and that no inconvenience could arise from such a right, for the damages in every such case would always be under the good sense and control of the juries of the country, who would ever be able to apportion them to the nature and circumstances of the case.

That as to the other ground taken in this case, they thought the best rule would be, in all cases where a slave behaved amiss, or with rudeness or incivility to a free white man, to complain to the master, or other person having the charge of such offending slave, who, if he was actuated by curtesy and civility to his neighbour, would on such application, give him the necessary satisfaction for every insult or piece of improper conduct which a slave had offered: and that this was the most likely means of preserving peace and good order in a neighbourhood, or in the community in general, without taking redress by his own arm, which the principles of the law would not justify. But if upon such reasonable application to the owner, or person who had the charge or government of such slave, he was refused reasonable satisfaction; then, upon an ap-

White v. Chambers.

peal to a civil magistrate it was his duty to see that reparation was made, according to the nature and circumstances of the case.

Rule for new trial, discharged.

Present, BURKE, GRIMKE and BAY.

Camden District, 1796.

WILLIAM THOMPSON *against* DAVID M'CORD.

Failure of consideration, a good ground of defence against a bond given for the consideration money of a tract of land. Defendant in such case, may shew that the title to the land at the time of sale was in a third person, although there has been no eviction by title paramount.

DEBT on bond.

The defence in this case was, that there was a defect in the title of the land for which this bond was given, or in other words, a failure of consideration.

It was stated and admitted in this case, that the bond on which this suit was brought, was given for the consideration money of a tract of land on the *Congaree River*, at a place called *M'Cord's Ferry*.

Mr. *Johnson*, counsel for defendant, offered to call witnesses to prove that the title of the land for which this bond was given, was, at the time of the sale, in a third person; consequently, that there must be a failure of consideration, as the defendant had no right to sell or convey the premises in question. That Colonel *Thompson* who had sold this land had acted as an executor to an estate, and made an executory deed. His intention was, he stated, to shew that the land did not belong to plaintiff's testator at the time of his death, but to another.

Mr. *D. Deas* objected to this kind of testimony, as irregular and inadmissible in this action, as it went to try the

Thompson v. M'Cord.

right of a third person not interested in the event of this suit. If this third person had a legal claim to the land, let him bring his action; the law was open to him for redress, and one of the clauses in the limitation act had expressly declared that no other claim should be admitted *but by suit at law*. That the deed from Colonel *Thompson* to the defendant *M'Cord*, contained a covenant of general warranty, and if there should be an eviction by this third person by title paramount, he would then be liable on this covenant for this consideration money and all damages.

See 3d clause of the act of *Limitations of Suits*, &c.

To this it was replied by defendant's counsel, that this defence was not set up in order to try the claim or title of this third person to the land, but only to shew that the executor was not entitled to the money mentioned in this bond, as the land was not the property of his testator in his life-time. This he said, would not give this third person a right to enter on the land; he must still bring his action, and recover before he would be entitled to his writ of possession. And if he chose to lay by till the expiration of five years after defendant entered, he would be barred by the statute of limitations. The defendant would then have a possessory right by statute, but none under the deed from testator's executor.

Bay, J. who presided at the trial of this cause at *Camden*, refused to admit this testimony; as it appeared by defendant's own shewing, by production of his deed, that it contained only a single covenant, *i. e.* that of a general warranty, with which the defendant was content at the time of concluding the bargain for the land; and it is a well known rule of law, that a grantor is not liable on that covenant, till an eviction by a third person having a title paramount. If there had been a covenant that grantor was lawfully seised, &c. then, upon discovery of the defect of title, an action would lay on such covenant. A grantee is not obliged to wait in such case, till there is an eviction,

Vaugh. 118, 119 1 *Wood's Conveyances*, 405.

CASES

ARGUED AND DETERMINED

IN THE

CONSTITUTIONAL COURT OF APPEALS,

OF THE

STATE OF SOUTH CAROLINA,

IN THE YEAR 1797.

Charleston District, 1797.

The Executors of JOHN ASHE, deceased, *against* The Executors of A. LIVINGSTON, deceased.

Assumpsit for *money had and received*, &c. will lie for money paid by a sheriff, by mistake to a prior judgment creditor, not knowing of a mortgage by which the lands sold were bound, and that it was not satisfied.

A mortgage does not lose its lien by not being put on record; any judgment afterwards must be subject to this prior incumbrance.

SPECIAL action on the case, for money had and received to plaintiff's use.

It appeared in evidence in this case on the trial, that in the year 1778, *Joseph Ashe*, the father of *John Ashe* the plaintiff's testator, had sold a tract of land at *Haddrill's Point*, in *Christ Church* parish, opposite the city of *Charleston*, to one *John Berwick*, now deceased, for the sum of 31,000*l.* current money, for which Mr. *Berwick* gave his bond, and a mortgage of the land to secure the payment of the consideration money. It happened in the hurry and confusion of the war at that day, that this bond and mortgage by some means or other got mislaid, and never were put upon record, (while on the contrary Mr. *Berwick* had his deed of conveyance for the land, duly proved and recorded,)

and they were not found till the year 1790, or 1791, near thirteen years afterwards; when they were discovered in a trunk among a number of old papers, which had been thrown by as useless trash.*

In the mean time, however, *John Berwick* died, and being considerably indebted to the estate of *Abraham Livingston*, *Nathaniel Russell*, the executor of *Livingston*, brought a suit against *Berwick's* executor, and obtained a judgment against the estate in *April*, 1787. In *January*, 1788, *Thomas Rivers*, another creditor of the estate of *Berwick*, obtained another judgment against said estate, and under this junior judgment an execution issued; by virtue of which, the sheriff of *Charleston* district seized the land or plantation at *Haddrill's Point*, which had been mortgaged to *Joseph Ashe* in 1778, and which then appeared to be without any incumbrances whatever, except Mr. *Russell's* prior judgment as the executor of *Livingston*. Under this execution the land in question was, in *April*, 1788, sold at sheriff's sale, for the sum of 1,625*l.* 2*s.* 6*d.* sterling, but as Mr. *Russell* had the prior lien on the land, in consequence of his first judgment, the sheriff paid the money over to him, towards the satisfaction of the debt due to the estate of *Livingston*; and Mr. *Russell*, in his turn, paid away this money in discharge of the debts due from the estate of *Livingston* to its creditors.

Upon the discovery of this bond and mortgage from *Berwick* to *Joseph Ashe*, in the trunk of old papers in 1791, the present plaintiffs, who were the executors of *John Ashe*, who was the executor of *Joseph Ashe*, the mortgagee, thought it advisable to relinquish their right under the mortgage, of foreclosing it, and proceeding to resell the land; and, therefore, commenced the present action against the executor of *Livingston*, for the proceeds of the sale which had been paid over to him, as for so much paid by mistake to their use.

* See the case of *Ashe* v. *Ashe*, *Bay's Rep.* vol. i. p. 304. *Riley's edit.*

Executors of Ashe v. Executor of Livingston.

The *Attorney-General* and Mr. *Holmes*, were concerned for the plaintiffs, and Mr. *Rutledge* and Mr. *Ward*, for the defendant.

A mortgagee has his choice of two remedies, where the lands have been sold by a sheriff, under a junior execution and money paid away to the plaintiff. He may either proceed in equity and foreclose the mortgage and go against the land, or he may relinquish his lien and go on at law for the proceeds in the hands of the plaintiff in the suit, to whom the money was paid as for so much money received to his use.

In support of the action it was briefly contended, that the plaintiffs, on the discovery of the bond and mortgage, had their choice of two remedies; either to proceed in equity and foreclose the mortgage and resell the land, or to relinquish their equity, and sue at common law for the proceeds of the sale, or value of the land in the hands of *Livingston's* executor. That they had preferred this latter mode of proceeding in order to prevent a multiplicity of suits, and avoid a heavy expense on the one hand, and to quiet the purchaser in the peaceable possession of the land on the other: and the rather, because he had made considerable improvements upon it since his purchase. They admitted, that the defendant, Mr. *Russell*, had an apparent right to receive this money at the time it was paid over to him by the sheriff of *Charleston* district, but still it was paid over under a mistaken idea, that there was no prior incumbrance on the land; whereas, it since appeared most unquestionably, that it had been mortgaged to *Joseph Ashe*, the former proprietor, for the original purchase-money; not one shilling of which either principal or interest had been paid. It would therefore be manifestly unjust for the defendant to retain this money to the prejudice of the plaintiffs, as they were, upon every principle of justice and good conscience, entitled to the same; and in support of their claim they relied on the great and governing principle laid down by Lord *Mansfield*, in *Moses* and *Macfarlane's* case, and in many other cases to the same point.

2 *Burr.* 1006. 3 *Burr.* 1984.

That this action will lay wherever *money has been paid by mistake*, or upon a *consideration which fails*, or for money got through fraud, or imposition, or extortion, or oppression, or in one word, it lies *for money which the defendant ought ex æquo et bono* to refund.

Here they observed, they did not mean to insinuate that this money had ever come unfairly into the hands of Mr. *Russell*, the executor of *Livingston*, but as it was obviously

paid to him under a mistaken idea that he was justly entitled to it; when in fact and in truth, it was the right of the plaintiffs' testator: he ought, therefore, in justice, now to refund it and pay it back, as the mortgage has fully evinced the plaintiffs' right to it; and that defendant ought not *ex aequa et bono* to retain it any longer in his hands. Executors of Ashe v. Executor of Livingston.

For the defendant, the counsel admitted the general principles of law in support of the action for money had and received, as laid down on the behalf of the plaintiffs; contending, at the same time, that there were several strong circumstances in this case, which took it out of those general rules, and made it a very different one from any of the cases relied on. In the first place, it was observed, here was very great *laches* in the mortgagee himself in not recording his mortgage, which had occasioned all the confusion on the present occasion.

Also on the part of the executor after the death of *Joseph Ashe*, in not looking for this bond and mortgage, and producing it at the sheriff's sale of the land; that it had been said, and said justly, that diligence is the life of the law, and here was a very culpable neglect.

That the executor of *Ashe* knew of the sheriff's sale, and did not forbid it, but stood by and saw it go on.

And lastly, it was contended, that the defendant had paid away this money out of his hands to the creditors of *Livingston's* estate, and had it not to refund; and that it would be unjust to make him chargeable, after having done his duty in paying off the testator's debts. They compared this conduct to that of a man standing by, and seeing another build on his land, knowing his right, and not forbidding the builder from going on: also to a first mortgagee, permitting a mortgagor to keep his title deeds till a second mortgage was made, without giving notice of his first mortgage. 2 *Atk.* 33. 3 *P. Wms.* 280.

Again it was urged, that Mr. *Russell* was to be considered as an agent in this business, in receiving and paying away this money without notice of this mortgage, in which

Executors of Ashe v. Executor of Livingston.

case he was not liable. They also relied on Lady *Windsor's* case,* where it is laid down, that this action will not lie for money paid to an agent, who pays it to his principal without notice.

* *Esp.* 109. 4 *Burr.* 1984.

They also relied on the case of *Jacob Jacobs*, a vendue master in *Charleston*, who had paid away money to his employer, which was claimed by a third person, who afterwards proved that the property sold belonged to him; yet the court held, as it was paid to the person having the apparent right without notice, he was not liable.

The *Attorney-General*, in reply, acknowledged the doctrine as laid down between principals and agents, that an action would not lay against an agent, who paid away money for his principal, without notice; but insisted that Mr. *Russell*, in the present case, could not be considered as a mere agent acting for a principal. The money was paid to him as the executor of *Livingston*, who stood in his testator's shoes, as one receiving all his testator's rights, and went to pay off his debts. The action in this case, is not brought against *Nathaniel Russell* in his own right, so as to make him, or his estate liable in his own private capacity, but it is brought against him, as the representative of *Livingston*. The judgment in this case would not bind him, or his estate, but the estate of *Livingston*; there was, therefore, no similitude or analogy between him, and a mere agent of a third person *in esse*. On the ground of *laches* or neglect, which had been so much relied on, that was owing to an accident arising in the hurry and confusion of war, which raged in this country at that time, and owing to a man's packing up his papers in the midst of tumult and arms, and afterwards dying, before he had an opportunity of explaining the transaction, or probably before he himself could recollect where he had deposited them, or how he had disposed of them; but however the accident happened, or by what means soever it was occasioned, it did not deprive his representatives of a legal right; for the law has fixed no time, nor limited any period, within which he was bound to record a mortgage, as laid

down in the case of *Ashe* v. *Ashe*:* the only risk he ran, was that of another mortgage being given for the same land, by *Berwick*; which, if it had been first recorded, would have had a preference. As to the cases quoted from *Atkyns* and *P. Williams*, they had no bearing on this case, because they are predicated on a *knowledge of the right*, and standing by and seeing a man go on upon mistaken principles, and not giving him due notice. Here the executor did not know of this mortgage at the time of the sheriff's sale, and therefore *was ignorant of the right of his testator*. He had no authority to forbid the sale.

Executors of Ashe v. Executor of Livingston

* *Bay's Rep.* vol. 1. p. 304. *Riley's* edit.

BAY, J. in charging the jury, told them, that the mortgage had not lost its lien, or binding efficacy, by not being put on record; it was good, and nothing could impeach it, unless there had been a younger mortgage from *Berwick*, first recorded.

That a judgment entered up against a mortgagor subsequent to a sale and prior mortgage, gave no sort of lien or priority whatever, as the judgment must be subject to all prior incumbrances.

That there did not appear to be any kind even of presumed assent on the part of the executor of *Joseph Ashe*, at the sale, as he was then ignorant of any such existing mortgage.

That this money being paid over to a person who was not entitled to it by law, in preference to the mortgagee to whom it of right belonged, was clearly a mistake; and, therefore, in this action, ought to be recovered back, upon the broad principles of equity and justice, laid down in the cases quoted by the plaintiffs' counsel.

That if the defendant, Mr. *Russell*, had been a mere agent for receiving and paying away money, then under the authority of Lady *Windsor's* case, and also on that of *Jacobs's* case, the action could not be maintainable; but as he represented the testator, *Livingston*, whose estate had received, &c. but an executor stands in the shoes of his testator, and the deceased's estate is liable to pay back the money received.

A mere agent who receives and pays away money for his principal without notice, is not liable in this action for *money had and*

Executors of Ashe v. Executor of Livingston.

ceived the benefit of it, that estate ought to refund or pay back the money.

The jury, after retiring a short time, returned a verdict to the amount of the money received by the defendants, but without interest.

This case was afterwards taken up to the constitutional court of appeals, on a motion for a new trial, on the ground of misdirection in the presiding judge, in his charge to the jury, which was fully argued by counsel on both sides; after which the judges declared their unanimous assent to the legal principles laid down by the presiding judge on the trial, and therefore refused the motion for a new trial.

Rule dismissed.

Present, BURKE, GRIMKE and BAY.

Charleston District, 1797.

WILLIAM GREENWOOD *against* The Executors of PETER BOCQUET.

Where lands have been mortgaged by a testator in his life-time, and there are judgments against him, some before and others after the mortgage, any moneys in the sheriff's hands arising from sales of his personal property, shall be appropriated in the first place to the satisfaction of the elder judgments, so as to leave the mortgaged premises, unincumbered, to go towards satisfaction of the mortgage money.

UPON a rule on the sheriff of *Charleston* district, to shew cause, why moneys in his hands should not be paid over to sundry prior judgment creditors, according to their seniority.

The case was briefly as follows. *Greenwood* had a mortgage on a valuable house and lot in *Charleston*, from the deceased, in order to secure a large sum of money he owed him; but there were several judgments prior to this mortgage, entered up against the deceased, in his life-time,

which bound his landed property, and which were unsatisfied at the time when this mortgage was given to *Greenwood*. After the date of this mortgage, sundry other creditors pressed the deceased for money, and obtained judgments against him in like manner; soon after which *Bocquet* departed this life, leaving all these judgments, as well as the mortgage, unsettled.

The prior judgment creditors being perfectly secure, were not very pressing for their money; but some of the later judgment creditors, fearing there might be a deficiency, pressed executions against the estate after the testator's death; in consequence of which, a number of negroes belonging to the estate were sold to a considerable amount, fully sufficient, if not more, than was competent to pay off all the prior judgment creditors, and to leave a small surplus towards some of the junior ones. In this situation the junior creditors had ruled the sheriff to pay over what moneys he had in his hands, arising from the sales of the negroes and other personal estate of the deceased, towards the discharge of their younger judgments. *Greenwood*, being apprized of the intention of these later creditors, to get the moneys arising from the sales of the personal estate into their hands, which would leave the mortgaged premises liable to the payment of the elder judgments, and probably defeat him ultimately of the benefit of his mortgage, applied for and obtained a rule on the sheriff, to shew cause, why he did not apply the moneys in his hands towards the payment of the elder judgments, according to their seniority, which would leave the mortgaged premises free from prior incumbrances, and liable only to the lien of his mortgage; so that all these rules on the sheriff came before the court at the same time, to determine how the moneys should be marshalled, and paid among the different creditors agreeably to law.

This cause was argued by Mr. *E. Rutledge*, in favour of the present applicant, Mr. *Greenwood*, and by Mr. *Ford*, on the part of the younger creditors.

Greenwood v. Executors of Boequet.

For the plaintiff it was argued, that the sheriff was bound by law, whenever he had moneys in his hands arising from sales made by virtue of executions, to pay off the eldest judgments and executions first. That he was bound at his peril to take notice of prior judgments on record first, and pay them off in rotation, beginning at the eldest, and so on, agreeable to their dates, and if he did not an action would lie against him. That it would be an abuse of the process of the court, to suffer the sheriff to appropriate the moneys in his hands arising from the sales of the personal estates of the deceased, towards the payment of younger executions, while there were elder ones, or prior judgments unsatisfied; and then to go on, and sell the real estate, to the prejudice of a *bona fide* mortgage creditor, to pay off those elder judgments; that the younger judgments were inferior in degree to the prior mortgage, and ought not upon any principle to have a preference to the mortgage; whereas, by this kind of management contemplated by the younger creditors, it would really have this effect, which he hoped the court would prevent.

On behalf of the younger creditors, it was said, that they were not to know whether the elder judgments were paid or unsatisfied; they had been laying over for many years, and for aught that appears in the office of the sheriff, they may have been paid off, though no satisfaction appears upon record. It was alleged that they had not been negligent, but had used all due diligence; they had lodged executions in the hands of the sheriff, and by virtue of them the negroes had been sold, and they were regular in calling upon the sheriff for the moneys in his hands, arising from the sales under their own executions. That they had nothing to do with Mr. *Greenwood*, or his mortgage, and considered his interference as officious, and calculated to impede and delay them in the recovery of their just and legal claims. That he had no right or authority to call upon the sheriff by rule of court, as he was not in court by record; and still less had a right to rule the sheriff to pay moneys over to parties,

who had not claimed it themselves, and who were in court on record, and competent to apply.

Greenwood v. Executors of Bocquet.

Per Curiam. There can be no doubt, but that the sheriff is bound to pay off all judgments on record first, agreeable to their seniority; and it had been so ruled in this court, over and over again; and it was very immaterial from what source the money arose, that came into the defendants' hands; whether from the sale of real, or personal estate. That in the present instance, if this general rule was departed from, it might have the effect in case of an eventual deficiency of assets, of cutting off the plaintiff, Mr. *Greenwood*, from the benefit of his mortgage entirely, or driving him into equity, for relief; for if the moneys in the sheriff's hands, were ordered to be paid over to the younger creditors, as contended for, it might happen that nothing else would be left, but the mortgaged premises, to pay off and satisfy the elder judgment creditors, which would certainly be very unjust, as the mortgage had a preference to all the younger judgments. To avoid, therefore, any injustice or delay to any of the parties, and to preserve all their just rights unimpaired, the court was unanimously of opinion, that the moneys in the sheriff's hands, should in the first place be paid over to the prior judgment creditors, or deposited in court for their use, and the balance, if any afterwards, be applied to the junior creditors. This would leave all the parties in the true situation where a court of equity would place them, if either of them had been forced into that court for relief.

See the case of *Tucker* v. *Lowndes*, *Bay's Rep.* vol. 1. p. 213. *Riley's* edit. See also, *Snipes* and *O'Hara's* case, *ibid.* p. 295.

Present, BURKE, GRIMKE, and BAY.

Charleston District, 1797.

ABERCROMBIE *against* MARSHALL.

A sheriff is liable for money paid into the hands of a clerk in his office, who embezzles it; although he may not have been authorized to receive it; the bare placing him in a public situation makes him responsible.

UPON a rule on the sheriff of *Charleston* district, to return a *fi. fa.* and to pay over moneys received thereon.

The sheriff on shewing cause, stated to the court, that the money in this case, was paid by the defendant to a clerk in his office, who was not authorized to receive money, and that he had made use of it.

The defendant's affidavit was produced and read, in which he deposed, that on hearing that an execution had been lodged in the sheriff's office against him, he went and got a statement of the debt and costs from one *Mitchell*, a clerk in the sheriff's office, and paid him the money, and took his receipt for it on behalf of the sheriff.

The sheriff then further stated, that in the routine of the duties of his office, he had deputies to serve writs, and the processes of the court, and to do out door business; a book-keeper, and one confidential clerk, who was his cashier, and who only was empowered to receive money; and that this money was paid to his book-keeper, and not to the clerk who was authorized to receive money, &c.

Mr. *Desaussure*, on behalf of the sheriff, contended, that the defendant paid this money at his own risk, as the book-keeper was not authorized to receive money in the sheriff's office; and compared this case to that of master and servant, where the master was liable for the acts of his servant only, as far as he was entrusted by him, and no further. Also to that of attorney and principal, where the acts of an attorney were binding on his principal, no further than he was empowered or authorized. 3 *Bac. Abr.* tit. *Master and Servant*, 562. *Salk.* 27.

Sed per Curiam. The sheriff's office is a public office, and one of great trust; always open for the transaction of

public business, and none but trust worthy persons should be employed in such an office. The act of placing a clerk in such an office implies a trust, and holds out to the world an idea, that he is a proper person to transact business with, in the line of the sheriff's office: and if a sheriff will place a man in such a situation, unworthy of his confidence, he should answer for it; the public ought not to be deceived by it. There is a wide difference between the private transactions of master and servant, where the master shall only be liable as far as he trusts his servant, and the conducting of a public office for the business of the world.

Abercrombie v. Marshall.

Rule made absolute on the sheriff, to pay the money into court for the use of the plaintiff.

Present, BURKE, GRIMKE and BAY.

STEPHEN SHACKELFORD *against* JAMES BARROW.

Columbia, April, 1797.

DEBT on bond to make titles to land.

This was a case tried in *Georgetown* district, before BAY, J.

In mutual covenants the payment or performance by one party raises an obligation on the other party to perform his covenant without a demand.

It appeared in evidence, that the defendant was, by the condition of the bond, to make good titles to three tracts of land, but no time was mentioned within which they were to be made.

That the plaintiff soon after paid the defendant the consideration money, but he could not make the titles to the land, as there were unsatisfied judgments against him, to more than the value of the land; whereupon the plaintiff brought his action on the bond.

Mr. *Falconer*, for the defendant, insisted that this action would not lie, as no demand of titles had been made on the

Shackelford v. Barrow.

defendant before the suit was commenced, and that the defendant in such case, had all his life-time to perform his covenant, unless it had been hastened by such demand. The judge overruled the objection, on the ground that the payment of the consideration money, raised the obligation on the part of the defendant, to make the titles at his peril; and that there was no need of a demand, where such obligation had commenced.

The case then went to the jury, who, notwithstanding this decision of the court, found for the defendant. This was therefore a motion for a new trial, on the ground that the verdict was against law, and the opinion of the judge who tried the cause.

After hearing arguments for and against this motion, the court was unanimously of opinion, that a new trial should be granted; as the verdict was against law, as well as the charge of the judge who tried the cause. That where there are mutual covenants to be performed on both sides, and no time is fixed for performance, in such case either party may hasten it by demand, or by payment, or by tender and refusal; but where one of the parties performs his part fully, from that moment the other party is bound to fulfil his part of it, in like manner. It is then that the obligation commences, in a moral, as well as in a legal point of view, on the part of the one who has not performed his covenant; and where an obligation has commenced, the party is bound to perform it at his peril afterwards.

Present, BURKE, GRIMKE, WATIES and BAY.

JOSIAH CANTY *against* THOMAS SUMTER. *Columbia, April, 1797.*

DEBT on bond.

This was a case tried at *Camden*, in which it appeared that the bond in question had been assigned over by *Josiah Canty*, the present nominal plaintiff, to *John C. Smith*, who was the real *bona fide* holder; and that on the trial, *Josiah Canty* was called upon by defendant to prove payment of this bond. He was objected to as an incompetent witness, as his testimony would go to impeach a security, which he had given; the bond had been transferred by him to *John C. Smith*, in the way of trade for a valuable consideration; and to suffer him to give evidence of payment, would go to destroy the validity of the bond, by shewing there was nothing due on it.

The obligee of a bond is an incompetent witness to prove payment so as to destroy the right of the assignee.

The courts of justice had frequently laid it down, as an invariable maxim, that no man shall be suffered to invalidate his own instrument; if it were otherwise, the consequence would be very prejudicial to commerce, and would go to destroy that confidence which men repose in each other, in their mutual transactions together; which objection the court sustained. The case then went to the jury, and there was a verdict for the plaintiff.

1 *Durn. and East*, 296, 297.

The case was afterwards taken up to the court of appeals at *Columbia*, upon a motion for a new trial, on the ground of misdirection, but it was refused by the judges unanimously.

Present, BURKE, GRIMKE, WATIES and BAY.

Columbia, April, 1797.

MOSES THOMPSON *against* JOHN MALLET.

If a jury take upon themselves to examine a witness after they retire into their room it is a good ground for a new trial.

THIS was a case taken up from *Columbia* to *Camden*, on a motion for a new trial, on the ground of misbehaviour in the jury.

From an affidavit made by *Daniel Brown*, it appeared that the jury after they had left the court and retired into their room, had taken upon them to send for and examine a witness, who had not been sworn and examined in court, without the leave of the court, or consent of the parties, or their attorneys; though this was not known at the time their verdict was received and recorded in court, but came out after they had been discharged.

See *Metcalf's* case, 2 *Morg. Essays*, 14.

The judges, without argument, ordered a new trial, without costs; observing, that this was very reprehensible conduct on the part of the jury, for which they had deserved to be fined, if it had been known to the court before they were discharged.

Present, BURKE, GRIMKE, WATIES and BAY.

Columbia, April, 1797.

FREDERICK SESSIONS *against* GEORGE BARFIELD.

Where arbitrators take upon them to make an award on other matters than those submitted to them by the bond of submission it is a good ground to set aside the award.

THIS was an action of debt on *an award*, tried at *Georgetown*, in which there was a verdict for the plaintiff.

It was afterwards taken up to the constitutional court of appeals, at *Columbia*, on a motion for a new trial.

In this case, the bond of submission was to abide and perform the arbitrament of the arbitrators therein named, No parol proof should be admitted to vary the import of the terms of submission mentioned in the condition of such bond.

of and concerning *a dispute about a horse sold under an execution.* The arbitrators, however, took upon them to make their award about other matters, *than the dispute about the horse*, not mentioned in the condition of the bond. On the trial, parol testimony was admitted, to prove that it was the intention of the parties to submit those other matters, although not fully expressed in the condition of the bond, which induced the jury to find in favour of the plaintiff.

Mr. *Falconer*, in support of the motion for the new trial, on the part of the defendant, contended, that no parol testimony ought to have been allowed, to prove any matter, not particularly mentioned in the condition of the bond, or in any wise to vary the tenor of it. It ought to speak for itself. That at all events, Mr. *Barfield*, his client, was only a surety to the bond, no wise concerned in the original dispute, therefore he never could be chargeable for the intent or meaning of the principal, or for any thing not expressed in the bond; otherwise, every security might be entrapped. That a contrary doctrine, would cut up the statute of frauds by the roots, and set every thing afloat, which had been fixed and rendered certain, by that act; and for that purpose, cited 3 *Will.* 539. *Ibid.* 371. 1 *Will.* 34. *Powell on Contracts*, 431. 1 *Bac.* 139. 142. 158.

Mr. *Johnson*, in reply, observed, that the variance arose from a mistake in terms, and that the parol testimony was admitted to explain the meaning of those terms, which the court would always permit in cases of ambiguity: he admitted in the fullest force, the dangerous tendency of suffering parol testimony to contradict or alter any deed whatever; that the statute of frauds was a wise and salutary act, and should not be impugned in any case; but insisted, there was no such contradiction before the court.

By the Court. It would be a most dangerous thing to suffer either principals or their sureties to be surprised, by

Frederick Sessions v. Barfield.

any evidence to prove that any other matters were submitted by arbitration bonds, than those expressed in the condition of such bond, or so to explain the meaning of the parties, as to make the least variation from the import of the terms of the submission. The court therefore was of opinion, that it was improper to permit any parol testimony to be admitted, in order to explain the intent and meaning of the parties to the arbitration bonds. The terms of submission ought to be plain and explicit, as to the object and design of them; and it is much better to let the time run out and expire, within which awards are to be made, than to introduce a principle of so dangerous a tendency, as the one contended for by the plaintiff on the present occasion; as in the end it might defeat the statute of frauds.

Rule for a new trial made absolute.

Present, BURKE, GRIMKE, WATIES and BAY.

N. B. This was the second new trial which was ordered in this case, there having been a former one, on account of the jury finding against the terms of the submission.

Charleston District, 1797.

THE STATE *against* DOCTOR FRASER.

In all misdemeanors the defendant is entitled to an imparlance over to the next succeeding term after the indictment is found.

UPON an indictment for a misdemeanor.

Doctor *Fraser* being a royalist in the course of the revolutionary war, was put upon the confiscation list, and returned to *Carolina*, where his family and friends were, without his name being taken off this list, contrary to one of the clauses of the act of confiscation and banishment.

No prosecution to be commenced for any *penalty*, *fine*, or *forfeiture*, under any *act of assembly*, unless commenced within six months after the offence has been committed.

Sometime after his return, information was given to the governor, who caused him to be taken up and imprisoned, for this return contrary to the terms of the act. A bill of indictment was given out and found against him, and a motion was made by his counsel, Mr. *Parker*, for leave to traverse this bill, as a matter of right until the next succeeding court; which was opposed by the *Attorney-General*, who contended, that this being what the law terms a high misdemeanor, a return from banishment for treason, the defendant was not entitled to the same indulgence, as in cases of inferior misdemeanors. That the offence and punishment being clearly pointed out by the act, all that was necessary, was, to *identify the defendant's person*, which neither required much time nor deliberation. That it was the policy of the act to do speedy justice in such cases, and to avoid delay as much as possible.

The State v. Fraser.

To this it was replied, on behalf of the defendant, that the higher the law considered the misdemeanor, the greater the necessity of having a reasonable time allowed for his defence; that there was no crime so great, or punishment so instantaneous, but the court would grant this indulgence, where they saw the justice of the case required it. That the act in question was a war regulation, one passed *flagrante bello*, and little suited to the day of peace and tranquillity. That no danger could be expected to the state at this day, from the few solitary individuals who had returned contrary to the terms of this act. That the passions and resentments of men of all descriptions, had happily subsided; and with them, the principles of the government itself had relaxed; for to the honour of the state, there had not been one single instance, in which it had refused to take these unfortunate men off the banishment act, where an application had been made to the legislature. That the defendant in this case, had intended to throw himself upon the liberality of the government upon this occasion; but was apprehended and taken up, before he had an opportunity of

The State v. Fraser.

doing so. That the treaty of peace with *Great Britain*, and the return of harmony between the two countries, had so far changed the relative situation of the two governments, as to induce them to bury for ever in oblivion, all that had passed in the struggle for independence; and as *America* had been so great a gainer by the revolutionary contest, she ought not to be the last in liberality towards those who differed in political sentiments from the majority of their former fellow-citizens.

4 *Black. Comm.* 345.

GRIMKE and BAY were of opinion, that they could not in justice refuse this motion; that the law had laid down no distinction between great and small misdemeanors; they were all put upon the same footing; and it had been the uniform practice of this court from time immemorial, to grant this reasonable indulgence, to men to prepare for their defence in every case of a misdemeanor whatever.

WATIES, J. afterwards came into court and fully concurred in this opinion. He also mentioned the case of a man who had been indicted for murdering a negro, which was the highest species of misdemeanor known in our laws, who was allowed a term to plead, and prepare for his defence. The motion was therefore granted, and Doctor *Fraser* was admitted to bail. At the next succeeding court he was discharged from the indictment; the prosecution not being commenced within six months after the offence was committed, (*i. e.* his return.)

See the act passed in 1748, p. 216. of the *Public Laws*.

This act after reciting that "whereas many *acts* of this "province (now state) had passed imposing penalties and "forfeitures upon offenders *against such acts* without limiting any time for commencing prosecutions against "such offenders;" the act then goes on and declares that in all and every case, "where any *penalty*, *fine*, or *forfeiture* "whatever *hath been*, or shall *hereafter be inflicted*, *or imposed* by any act or acts of the general assembly of this "province, (now state) *already passed*, or *to be* passed, and

"the time for prosecuting such offender or offenders, is not "therein provided, no information, action, suit or prosecu- "tion, shall be had, issued, brought, or commenced against "the offender or offenders against any such act or acts, un- "less the same be done within *six months*, after the time "when the *offence shall be committed;* and all and every "offender, or offenders against any such act or acts, shall "not from thenceforth be subject or liable to any *penalty*, "*fine* or *forfeiture*, which may be thereby inflicted or impo- "sed, any law, usage or custom to the contrary notwith- "standing. This to be deemed a public act," &c. &c. &c.

In the confiscation act there was no time limited for commencing any prosecution for any offence against that act; it was therefore under a fair construction of the act of 1748, that the defendant in this case was finally discharged.

Present, GRIMKE, WATIES and BAY.

THE STATE *against* BERNARD RIPPON.

Charleston District, 1797.

UPON an indictment for receiving stolen goods, in the court of sessions.

The defendant was convicted on this indictment, and Mr. *Marshall* gave notice of a motion for a new trial at the next constitutional court of appeals, on the grounds that the jury had found a verdict against law and evidence.

At a meeting of the next constitutional court of appeals, Mr. *Marshall* moved for leave to go into the consideration of his motion for the new trial, which was opposed by the *Attorney-General*, because the defendant was not present to abide the sentence of the court, in case the motion should be overruled; and the rather because he had been admitted

The State v. Rippon.

to bail before his trial, but as soon as he had heard the verdict against him, he had slipped out of court, and had since concealed himself. He observed, that the court had laid down a rule, not to hear any motion in arrest of judgment, or for a new trial, in any case where either imprisonment or infamous corporal punishment was to be awarded, unless the defendant, or person convicted, was present and in custody of the sheriff, ready to suffer or abide whatever sentence the court, after the final determination of the case, might think proper to inflict. For if this was not the uniform practice of the court, it was easy to foresee that every culprit who dreaded confinement, or other corporal punishment, would in every case move for a new trial, or in arrest of judgment, and if he was not within the four walls of a prison, he would speculate afterwards on the chances for or against him on the event of such motion, and appear or abscond, as it suited him. For it was well known there was nothing a man would not do, rather than suffer infamous punishment, and very few would submit to imprisonment if he could get off. In the present case, our act of the legislature was a very severe one against offences of this kind, and inflicted the pillory, fine, and imprisonment. It was not discretionary in the court, to inflict the one or the other, as it thought proper; but was imperative as to the whole; though the time and the amount were left discretionary, yet the nature and quality of the punishment could not be altered or changed. Under those circumstances, he said, it would be trifling with the time and dignity of the court, to go into and determine such motions as the present, without the power of doing complete justice to the public as well as to the individual.

The court, after consultation, was of opinion, that the rule of practice laid down in these kind of criminal cases, and which had been long acquiesced in, could not be dispensed with. That wherever corporal punishment was either *probable*, or *certain*, the defendant should be in the power of

The State v. Rippon.

the court before they proceeded to hear a motion of this kind, as the judgment of the court must be pronounced upon the determination of the question after argument, which might be a nugatory act, unless the party was in court to receive his sentence, and in the custody of the sheriff to have it carried into execution.

The court therefore refused to go into the argument, and directed the *Attorney-General* to proceed against the defendant and his sureties upon their recognisances; and in the mean time, ordered a bench warrant to issue against the defendant upon his conviction, in order to have him apprehended and brought to final justice.

Present, BURKE, GRIMKE, WATIES and BAY.

DOCTOR JAMES *against* DOCTOR O'DRISCOLL.

Charleston District, 1797.

MOTION for a new trial.

Where services were originally rendered *gratuitously* they shall never afterwards be converted into a *charge*. All contracts must be good or valid at their original creation, and must not depend upon subsequent contingencies.

This was a case on a summary process which the defendant did not choose to submit to the judges' decision alone, but claimed his right of submitting it to a jury, under a clause of the "act giving the judges a power to determine "all causes under 20*l*. sterling, in a summary manner, "without a jury; *but with this reservation*, that if either "party chose to claim the right of a *trial by jury*, he should "have that privilege;" the cause accordingly went to a jury, when Doctor *James* produced his day book to prove his original entries. Mr. *Marshall*, for the defendant, then contended, that these charges were originally intended to have been rendered gratuitously, and never to be converted into a charge against the defendant; that they were both physicians, who practised in the same parish, and had been upon very friendly and intimate terms with each other; but

James v. O'Driscoll.

afterwards they quarrelled, and had a very serious difference; and it was during this social intercourse and good neighbourhood, that the services charged were performed in the defendant's family, by his brother physician: and upon inspection of the plaintiff's day book, the entries would appear, he said, to have been made upwards of two years after the time the services were rendered, which was not contradicted. That all the other entries in the plaintiff's day book, where charges were intended to have been originally made, were entered by the plaintiff with a great degree of regularity, in regular successive order, day after day, as they occurred; but the entries of these charges, were more than two years after the performance of the services; and that, too, after the breach had been made in their former friendship: which evinced beyond all doubt, that the plaintiffs' attendance in the defendant's family was intended by him as gratuitous, and that he had no idea of converting them into a charge, until after this quarrel; he said the law was very clear upon the point, and mentioned a case tried in *Ireland*, where an attorney took an apprentice, and it was agreed that the apprentice should find himself diet and lodgings, but the master taking a fancy to the lad, had found him board and lodgings himself for the five years; on a quarrel, however, afterwards, he made a charge of this board, &c. In this case, the *Irish* judge, who tried the cause, left it to the jury to determine, whether the master intended it as a *charge* or a *favour*, and the jury found for the apprentice: also relied on 2 *Str.* 728. where a man who was no broker, had acted as one, in hopes of a legacy; but here the court said, it had the appearance of acting as a *friend*, and as if he did not expect to be paid for it; in which case, he could not maintain his action.

The judge in the present case, in like manner, left it to the jury to determine, whether Doctor *James*, at the time he performed the services in this case, intended it as a *favour* or a *charge*, and to return a verdict accordingly.

The jury found for the plaintiff the amount of his demand 10*l.* sterling.

James v. O'Driscoll.

After argument in favour of this motion for a new trial, the judges laid it down as correct law, that all contracts must be good or bad in their original creation, and must not depend on subsequent contingencies; that is, whether the party chose to make it a gift, or a charge at a future day or not. That it will never permit a friendly act, or such as was intended to be an act of kindness or benevolence, to be afterwards converted into a pecuniary demand; it would be doing violence to some of the kindest and best effusions of the heart, to suffer them afterwards to be perverted by sordid avarice. Whatever differences may arise afterwards among men, let these meritorious and generous acts remain lasting monuments of the good offices, intended in the days of good neighbourhood and friendship; and let no after circumstances ever tarnish or obliterate them from the recollection of the parties. But as the party defendant himself had thought proper to take this case from the court, and to submit it to a jury, who in the summary and equitable jurisdiction of this court, were judges, jurors and chancellors of his own choosing, he must be bound by their decision or verdict, as much as he would have been bound by an award of arbitrators, against whom no misconduct could be alleged.

See 10 *Mod.* 67. *Vin.* tit. *Contract*, vol. 5. p. 507.

Therefore the motion for a new trial was refused on the latter ground only.

Present, BURKE, GRIMKE, WATIES and BAY.

Charleston District, 1797.

HUNT *against* CHARLES HOWELL SIMONS.

A man taking the benefit of the insolvent debtors' act in the inferior city court entitles him to a discharge against a suing creditor in the court of common pleas.

UPON a motion to have defendant discharged from prison, he being in custody on a *ca. sa.*

Mr. *Desaussure* moved for the defendant's discharge, on the ground that he had taken the benefit of the insolvent debtors' act in the court of wardens, for the city of *Charleston*, and had been discharged from the custody of the city sheriff, upon giving up his effects for the benefit of his creditors in that court, which he contended operated as a discharge from the suits depending in the court of common pleas, as well as from those which had been commenced in the inferior city court; for the insolvent debtors' act expressly declares, that a man who shall fully and fairly give up all his estate real and personal to his creditors, shall be for ever discharged, as well against the claims of those at whose suits he may be confined, as against all his other suing creditors.

The words in this act are general, and as comprehensive as they well can be; and extend to the suing creditors in any court, or in any jurisdiction whatever; and upon this ground it is, that the court of equity, has uniformly discharged defendants who have been confined by process from that court, who had previously taken the benefit of the insolvent debtors' act in the court of common pleas.

Against this motion it was urged, that the court of common pleas, being a court of supreme jurisdiction, was not bound by any of the acts of an inferior court of limited jurisdiction; nor was it bound to notice their proceedings, although the court of equity, being a court of supreme jurisdiction, may pay that respect to the proceedings of a court of supreme law jurisdiction, which was of equal notoriety with itself.

But it was resolved by the judges unanimously, that they were bound to take notice of the proceedings in the inferior courts, where they were regular and agreeable to the rules

Hunt v. Simons.

of law; for although the court of common pleas possessed a superintending and controlling power over them, when they erred; yet when they confined themselves within their proper limits and jurisdictions, and acted legally, this court would support their proceedings.

That the insolvent debtors' act, was a remedial law, and should be beneficially and liberally construed for unfortunate men, who acted a fair and honest part; and it operated as a discharge in law, against all a man's suing creditors; it was immaterial in what courts the suits were commenced; the act was as effectual a discharge in one court, as in another. The plaintiff, however, has a right to a distributive share of the insolvent debtor's effects, by giving in his claim to the assignees appointed by the city court. Let defendant be discharged.

All the Judges present.

N. B. Upon the authority of this case, great numbers have been discharged by the court of common pleas, who had taken the benefit of the insolvent debtors' act in the inferior court.

THOMAS SINGLETON *against* The COMMISSIONERS OF THE CHARLESTON TOBACCO INSPECTION.

Charleston District, 1797.

In cases of summary convictions by commissioners of tobacco inspection the charges against an inspector should be specific, and all the witnesses ought to be on oath, that the court may judge of the reasonable grounds of a removal from office; otherwise, a *mandamus* will lie to restore him to office.

UPON a rule to shew cause why a *mandamus* should not issue, to restore the plaintiff to the office of inspector of tobacco, from which he had been removed.

It appeared by the book of proceedings kept by the board of commissioners, that the plaintiff, Mr. *Singleton*, had been removed from his office of inspector of tobacco, at the

Singleton v. Commissioners of Tobacco Inspection.

Charleston warehouse, which he had held for many years. The charges against him, as appeared by the minutes entered in their book, were three:

1. Drunkenness, so as to be incapable of performing his duty.

2. Passing unmerchantable tobacco.

3. Keeping money in his hands for tobacco sold by him, and not accounting for it.

The two first charges were denied, but the third was partly admitted to be true by the plaintiff, to wit: that he had sold tobacco and kept the money in his hands, which he was ready to account for, when called upon for that purpose, by the persons entitled to it.

The commissioners justified their proceedings under the act of the legislature, for regulating the inspection of tobacco in 1785, which authorizes them to "appoint inspect-"ors, and in cases of neglect of duty, in not giving proper "attendance, or any malpractice, to remove them at plea-"sure, and appoint other fit and proper persons in their "room and stead." In pursuance of the powers given them by this act, they alleged, that they had proceeded to call the plaintiff to an account, and to examine witnesses as to the different charges against him, all of which they said had been proved to their satisfaction; and therefore it was, that they had removed him from his office, and appointed another in his place.

The plaintiff, in reply, alleged he had been illegally displaced by the commissioners, inasmuch as the charges were not furnished him in writing; he did not know them till he was called upon to answer them; there was no time or place mentioned, when and where the supposed malpractices were committed, and that the witnesses on whose testimony he was removed, were not sworn to tell the truth against him. As to the third and last charge against him, he insisted the commissioners had no authority to call him

Singleton v. Commissioners of Tobacco Inspection.

to an account about it; for by the act, the inspector is authorized to give small notes, for small parcels of good tobacco sold after the bad is picked out; which notes he is authorized to pay to the holders, when produced after the same is sold and disposed of, and that he has always been ready and willing to account to the holders of such notes, whenever they should be produced.

After hearing arguments for and against this motion, the court held that wherever a statute created an office unknown to the common law, and appointed commissioners to superintend such office, with certain specified powers; they were bound in the exercise of such powers, to pursue them strictly, and to conform to common law rules, as nearly as possible; particularly in summary convictions, without the intervention of a jury. That the officer whose conduct was to be inquired into, should have certain specific charges exhibited in writing against him, and a reasonable time allowed him, in every such case to prepare for his defence. All witnesses for and against him, ought to be *on oath, to declare the truth;* and the substance of such examinations should be taken down in writing, in order that the court might be enabled to judge, whether (in case of their proceedings being called in question) they were justifiable or not, in their proceedings. In the case now under consideration, as far as respects the two first charges, these rules were not observed; but the inquiry and examination into the inspector's conduct, appears to have been precipitate, and none of the witnesses against him were on oath, nor was the substance of their testimony minuted down or taken notice of in their proceedings, that the court might judge whether there were reasonable grounds for his removal or not: and as to the third and last charge, that of not paying over moneys in his hands, arising from the sales of tobacco, he cannot be said to have committed any offence, unless he had refused to pay off some one or other of the small notes

See the case of *Geter* v. *The Commissioners of the Campbelltown Tobacco Inspection warehouse*, where all these principles are very fully laid down, in *Bay's Rep.* vol. 1. p. 354. *Riley's* edit.

Singleton v. Commissioners of Tobacco Inspection.

to the holders, on demand by them, or their lawful agents made for that purpose.

The rule for the *mandamus* to issue to the commissioners, to restore the plaintiff, was made absolute.

Present, BURKE, GRIMKE and BAY.

Charleston District, Feb. 1797.

ALEXANDER ROSE *against* WILLIAM MACLEOD.

A bond in the penalty of 76 negroes, conditioned for delivery of 38 on a certain day, amounts to a covenant in law, to deliver the 38 negroes on the day appointed; and if defendant fails to deliver them, he is liable for the average value of them. And although the legislature pass an act to prohibit the importation of slaves, so as to prevent the specific delivery of them, the defendant is still liable for the real amount of their value in money.

THIS was an action on a bond dated *November* 10th, 1785, given by defendant to plaintiff, in the penalty of seventy-six new negroes, conditioned "to pay and deliver thirty-eight ne- "groes, on the second day's sale of any cargo defendant "might choose, which he should import between that time "and *January* 1, 1787, and if none should come by that "time, a farther indulgence was to be given till *January* 1, "1788, with interest of *7 per cent.* to be paid annually."

Upon this bond, the plaintiff had brought an action of covenant, taking the penalty and condition together, as amounting to a covenant to deliver thirty-eight negroes, &c. To this suit the defendant pleaded that the legislature of this state, in *March*, 1787, passed a law prohibiting the importation of slaves from *Africa*, or other parts beyond sea, &c. under very severe penalties, which act put it out of the defendant's power to deliver negroes, according to the condition of the bond, and this special matter he pleads in bar of this action. To this plea the plaintiff demurred.

Mr. *Ford*, for the plaintiff; Mr. *Pringle* and Mr. *Ward*, for the defendant.

After hearing the defendant's counsel, the court without hearing the counsel for the plaintiff, sustained the demurrer,

Rose v. Macleod.

overruled the plea in bar, and determined that this action of covenant would well lie. That although the intervening act of the legislature prevented the specific delivery of the thirty-eight new negroes, and the law so far dispensed with the specific performance, yet that the contract was not thereby rescinded, or the defendant absolved from all obligatory effect under it.

That it was competent to the plaintiff, under the averments in his declaration, (of the covenant to deliver thirty-eight negroes, and that they were of the value of *52l.* sterling,) to go into evidence before a jury, who would fix the value of the contract and give a verdict accordingly. That the bond might be given in evidence to support the action of covenant, the essence of which is, to deliver thirty-eight negroes, and pay interest at the rate of *7 per cent.*

Present, BURKE, GRIMKE, WATIES and BAY.

The cause afterwards went to a jury, when after offering this bond in evidence, to substantiate the agreement as stated in the declaration, and proving the breach and value of the negroes, the jury gave a verdict for the plaintiff for the average value at *52l.* sterling, round.

BENJAMIN WARING *against* THE CATAWBA COMPANY.

Charleston District, 1797.

ASSUMPSIT for goods sold, and for work and labour, &c.

A member of a corporation may maintain an action against such corporate body for any just demand against it.

Plea in abatement.

This case came before the court upon a plea in abatement, which pleaded that plaintiff was himself a member of the company, and therefore could not maintain any action against it in his individual capacity.

Waring v. Catawba Company.

Mr. *Trezevant*, for the plaintiff, argued, that there was a wide difference between a copartnership in trade, and a corporation. Copartners, he admitted, must sue and be sued jointly; that they were jointly and severally liable, &c. But a corporation (as in the present case) must be sued in its corporate name; that the private property of its members were not liable, only the corporate property; so that there was a wide difference between a corporation and a copartnership, both as to the mode of bringing an action, and as to the effect of any judgment or decree against them.

That by an act of the legislature, passed in the year 1792, corporate bodies are expressly authorized to recover and receive from their members all fines, forfeitures, and other debts, dues and demands, arising in any manner howsoever. Surely then, he argued, if corporate bodies have a right to recover from their members, in their private capacities, any debt or demand, such members, in like manner, must have an equal right to recover from such corporate body any debt or demand due or owing to any individual of that body; or they might set off in discount any such demand against the corporation, in a suit against them. Justice must be reciprocal in its nature, or it ceases to exist; for to say that one man, or body of men, shall have a power to pursue a right against another, and that other should not have a right to prosecute his claim or remedy in his turn against the body corporate, would be a perversion of principles.

But, he said, he conceived that this point had been settled by a number of adjudications in our own courts, at different times. The Mount Zion Society, the Library Society, the City Council, all corporate bodies, had been in the habits of recovering moneys from their members, and members in their turn had recovered money from them. The cases of *Bourdeaux* and *Stephen Drayton* against *The Santee Canal Company* were cases in point; in both which cases they were allowed to maintain actions, and to recover their salaries from the company, upon the foregoing principles, although they were both of them members.

The *Attorney-General*, contra, said this company ought to be considered as an association for gain, or the emolument of its members, and therefore in law should only be considered as a kind of copartnership, and not as a public corporation. That the act of 1792 should be construed literally, and confined to its letter, in which case it would then be found to give a right only to a corporation to sue its own members, but that it gave no right to a member to sue the corporation, and it should not by any construction be carried further than it expressed.

The Court, after hearing the arguments, overruled the plea in abatement, as containing principles subversive of justice; but they observed, that the two cases of *Bourdeaux* and *Drayton* against *The Santee Canal Company*, had settled this point, as they had both been allowed by this court to maintain their actions for their salaries, &c. against the company, as well as the cases respecting the other public societies, mentioned in the argument.

The plaintiff was then allowed to go on and prove his debt to a jury.

Present, BURKE, GRIMKE and BAY; but as Judge GRIMKE was a member of the company, he declined giving an opinion.

Charleston District, 1797.

GEORGE CARLIN *against* ANDREW KERR.

Paying money to a clerk in the sheriff's office will charge the sheriff, although not authorized to receive moneys generally.

RULE on the sheriff to shew cause why he should not pay over money received on an execution.

The cause shewn by the sheriff in this case, was the same as shewn by him in the case of *Abercrombie* and *Marshall*, (*ante*,) to wit, that it was paid into the hands of a clerk who was not authorized to receive it.

But *the Court*, without hearing argument, ordered the rule to be made absolute on the sheriff, to pay over the money, on the grounds already settled in the case of *Abercrombie* and *Marshall*.

Present, BURKE, GRIMKE and BAY.

Charleston District, 1797.

JAMES WALLACE *against* BARNARD RIPPON and Wife.

A bond given by a married woman is void although she be a *feme sole* trader, unless she is specially stated to be one in the proceedings against her; and if taken on a *ca. sa.* without pleading it, she is entitled to her discharge, as all the proceedings are void *ab initio*.

UPON a motion to discharge Mrs. *Rippon* from the custody of the sheriff, on a *ca. sa.*

In this case, judgment was taken against *Rippon* and wife, on a bond signed by both of them, in consequence of which an execution, a *ca. sa.* issued, on which she was taken and imprisoned. This was a motion to have her discharged, on the ground that the whole proceedings as against her were null and void.

The *Attorney-General* contended, that as she was under coverture at the time this bond was given, it was absolutely null and void; and, of consequence, all proceedings upon it

as to her were void also. It was almost needless, he said, for him to urge that all contracts of a married woman during coverture, were not only voidable, (as the contracts of infants,) but absolutely void; but he admitted that the bond and proceedings upon it were good and valid against the husband.

Mr. *Johnson* admitted the law laid down by the *Attorney-General*, but contended, that Mrs. *Rippon* was a *feme sole* dealer, and had the right under a special agreement of her husband, in pursuance of the directions of the act of assembly in such case made and provided, to make such contracts, and that having done so, she was bound in her person and estate to fulfil them. That the bond in this case was given for building a house on a lot purchased by her out of the profit of her dealings as a sole trader; and, therefore, under the act, she is clearly chargeable, as well as in justice and good conscience.

The *Attorney-General*, in reply, said, if she had been sued singly in that case, coverture might have been pleaded, when plaintiff might have replied that she was a sole trader; then, under the act, she might have been made liable. But in the present case, the proceedings themselves shew, from the beginning to the end of them, that she was under coverture, and there is no allegation, even in the proceedings, that she was a sole trader; so that she cannot be chargeable upon this bond, or in this action, *as she is only stated to be the wife of Barnard Rippon.*

The Judges were all clearly of opinion, that the bond in its present form was originally void as to her, and consequently all the proceedings upon it were void also. That a *feme covert* may be made a sole trader under the act of assembly, and even in some cases by the common law, but then that must always be set forth in the original contract,

Wallace v. Rippon and Wife.

and specially shewn in the legal proceedings, and alleged on record, as it is a deviation from the general law of the land. In the present case there is no such allegation; consequently all the proceedings upon the face of them are absolutely void as against her, but are good and valid against the husband.

She was, therefore, discharged.

Present, BURKE, GRIMKE, and BAY.

CASES

ARGUED AND DETERMINED

IN THE

CONSTITUTIONAL COURT OF APPEALS,

OF THE

STATE OF SOUTH CAROLINA.

IN THE YEAR 1798.

ESTHER LYNCH *ads.* JAMES WITHERS.

Charleston District, 1798.

TRESPASS to try title to land.

The defendant pleaded in bar a nonsuit obtained in 1788, in an action of ejectment brought in the name of the lessee of *Thomas Smith*, who claimed the land in question; and also a verdict for the defendant and others, in 1789, in another action of ejectment, for recovery of the same land, brought by *Robert Smith*, the heir at law of the said *Thomas Smith*.

It appeared from the pleadings, that *Thomas Smith*, the lessor of the plaintiff, in the first action, at the time of bring-

In all cases for trying titles to lands in this country, the plaintiff, in case a verdict or judgment of nonsuit should be against him, shall be entitled to a *second action*, if commenced within two years after the determination of the first; but it not commenced within two years, he, and *all others claiming under him*, shall be for ever barred therefrom.

Lynch ads. Withers.

ing it, was dead, and that it was brought at the instance of his executors, who were directed by his will to sell the land in dispute, and to give titles for the same; and that they also procured the second action to be brought in the name of the heir at law. The plaintiff's counsel contended that the first suit was a nullity, because brought in the name of a person who was dead at the time, and because the executors had only a bare power to sell the land, uncoupled with any interest; that the right of freehold was in the heir at law until a sale, and also the right of possession; and that, therefore, this nonsuit could not be binding or operative on him, or those claiming under him; consequently, as the present plaintiff, *Withers*, held under *Robert Smith*, who was the heir at law of his father, *Thomas Smith*, and had brought only one action of ejectment, it was contended the plaintiff was entitled to this second action, to try the right of freehold, under a fair construction of the act of assembly.

The Judges after hearing the arguments, were unanimous in this case, and WATIES, J. delivered the opinion of the court which was substantially as follows:

Powell on Devises, p. 292. &c.

That the cases quoted from *Powell on Devises*, very clearly evinced that the freehold of the land belonged to the heir at law, until a sale by the executors; and that the power given to them, was a mere naked one, without any interest or even right of possession, and of course without even a right to a possessory action. But admitting all this was given to them by the will, why were not the suits brought in their names? why in the name of the testator in the first, and in the name of the heir at law in the second action?

If the right of possession was really in them, then both the actions were wrong, and therefore neither of them binding on the present plaintiff. It would be sufficient, however, for the present plaintiff, if only one was wrong; and if the case rested here we should have no power to put a stop to the action he is now bringing.

Lynch ads. Withers.

But there is another ground, which was not relied on by the counsel, upon which we think we are bound to give judgment for the defendant.

It appears that the second suit which was brought by *Robert Smith*, the heir at law, in which there was a verdict for defendant, was in 1789; that suit was confessedly well brought, for the right to the possession of the freehold belonged to the heir until a sale by the executors. But it appears, that the present action has been commenced since *May*, 1794. The trespass complained of* is stated in the pleadings, to have been committed at that time; the action therefore must have been brought since, which is five years after the first action to try title to the lands in question. But the act which has been pleaded in bar to this suit, requires "that the plaintiff *or any other person claiming under him*, "shall commence his second action within *two years* after "the first, otherwise he shall be for ever afterwards barred "and prohibited from bringing such second action." Now the claim of the present plaintiff is under the heir at law, *Robert Smith*, as well as the testator, *Thomas Smith*.

From the authorities before referred to in *Powell*, it appears that the right of the testator was not vested by the will in the executors, and as it could not be in abeyance, it must have remained in the heir until the executors devested him by a sale, and this is admitted by the plaintiff's counsel.

The claim then of the present plaintiff, must come through *Robert Smith*, from the testator; and although the conveyances are made to him by the executors, yet they have only executed a naked power, and the claim they have conveyed, is necessarily the same claim which belonged to *Robert Smith*, the heir at law, until the sale. As the present plaintiff is therefore one claiming under *Robert Smith*, against whom a verdict has already been found, and more than two years have elapsed since the determination of that

* The act for changing the action of ejectment into that of trespass, in order to try title to lands, passed *February*, 1791, which accounts for the different nature of the first and second actions mentioned in this case.

Lynch ads. Withers.

action, we are all of opinion, that he is barred by the act, which has been pleaded in bar to this action. This is no strained construction. If the act is fully examined, this will be found to be the only reasonable construction which can be given to it. Before the act was passed, a man had a right only to one action of ejectment, for the recovery of lands. The common law right of bringing actions as often as he pleased, had long before been taken away by the limitation act, in 1712; and if a nonsuit or verdict went against him in one action, such nonsuit or verdict was, by the 4th section of the last mentioned act, definitive and conclusive against him.

See act of Assembly, passed in *May*, 1744. *Public Laws*, 190.

The act of 1744, however, enlarges this right, and allows the plaintiff another chance of establishing his right, by a second action; but it allows it upon condition, that *he*, or any other *person claiming under him*, shall *commence it within two years after the determination of the first action:* if he fails to do so, he loses all the benefit of this law. This act is not therefore in derogation of the common law right, which had been taken away before, by the act of 1712; and even if it was, we should not be willing to give it a strict construction on that account.

The right of suing indefinitely, *toties quoties*, &c. is a mischievous one, if unrestrained. The titles of our citizens must be tortured by unceasing litigation. The restriction therefore imposed by this act, is a wise and salutary one, and deserves rather to have a liberal construction.

It may be thought that we go too far, in taking a ground which was not insisted on by the defendant himself, and is not formally pleaded. But it is sufficient, if it appears substantially in the pleadings. If there is sufficient matter apparent in them, it is our duty to take notice of it. The want of form in setting it forth, unless specially demurred to, is not to be regarded, but the substantial merits of the case; and the court is bound to give judgment according to the very right of the case; and this is expressly enjoined

upon us, by the statute of *Ann.* which is of force in this state.

Lynch ads. Withers.

For these reasons, we are all of opinion, that judgment should be for the defendant.

Present, BURKE, GRIMKE and WATIES.

N. B. For the proper understanding this case, it is necessary to inform the reader, that previous to the year 1791, the action of ejectment, had from time immemorial, been the action for trying titles to land in this country. But as that action depended upon a string of legal fictions, not generally understood, except by professional men, the legislature, by an act passed on the 19th of *February*, 1791, thought proper to change the mode of proceedings in land causes, from *ejectment* to *the action of trespass;* in which, the real names of the real parties were to be mentioned in all the proceedings, and to declare that it should be as effectual for trying titles of lands in this state, as the former action of ejectment had been; that the jury should have the power to give damages for *mesne* profits in the same action, and upon the plaintiff's entering up his judgment, on any verdict in his favour, he should, in addition to his execution for damages, have his writ of possession. In all other respects it was to have the same effect, as a recovery would have had in the former action of ejectment.

Charleston District, 1798.

WILLIAM HASELL GIBBES *against* WILLIAM BOONE MITCHELL.

The year and day for renewing executions, so as to render a *sci. fa.* unnecessary, is to be computed, not from the time of its being lodged in the sheriff's office, but from the last day it has to run in court, before its final return; any delay occasioned by a defendant himself, by an injunction out of chancery, &c. not to be taken into the account; for upon the dissolution of it, the cause is restored to the same state it was in before the proceedings at law were stopped. Where a sheriff has made a levy by virtue of a *fi. fa.* he may proceed to sell after the year and day, without renewal by a *sci. fa.* or even after he is out of office, for he who begins an execution must end it.

UPON a rule to shew cause, why an execution *fi. fa.* should not be set aside, on the ground, that more than a year and a day had elapsed before it was issued, without the judgment being renewed by a *sci. fa.*

The judgment was entered up in this case against defendant on bond, on the 7th of *August*, 1795; *fi. fa.* was lodged the 1st of *February*, 1796; and on the 22d of *March*, 1796, the sheriff made a levy on a tract of land, and sundry negroes.

On the 1st of *April*, 1797, the defendant conceiving that he had grounds of equity against this proceeding, filed his bill in equity, and on that day obtained an injunction, to stay proceedings on this execution. In the month of *October*, 1797, this injunction after argument was dissolved; and on the 18th of *November* following, the sheriff proceeded to advertise the property levied on, by virtue of the above execution. The present was therefore a motion, to set aside this execution, as more than a year and a day had elapsed, since it was lodged in the sheriff's office, and the advertising on the part of the sheriff of the property for sale on the 18th of *November*, 1797.

In support of this motion, it was contended, that as this execution was lodged in the sheriff's office on the 1st of *February*, 1796, it lost its active energy after the 2d day of *February*, 1797, the year and day having then expired; and that it was absolutely necessary by the rules of the common law, and the *practice of this court*, that a *sci. fa.* to revive the judgment should have issued, and a new execution taken out, before the sheriff was authorized to proceed.

For the plaintiff, in reply, it was argued, that although twelve calendar months had expired, from the time of lodging the execution in the sheriff's office, say from the 1st of *February*, 1796, to the 2d of *February*, 1797, yet the execution had a further day in court, to wit, to the 22d *March*, 1796, being the day on which the said execution was returnable, and ten days after, which carried it down to the 2d day of *April*, 1796; and from that day, to wit, the 2d day of *April*, 1796, and not the 1st of *February*, 1796, the year and day for renewing the execution, should, and ought to be computed or calculated; which according to the course of proceedings would have made the renewal good, (if it had been necessary in this case,) at any time during the 2d day of *April*, 1797; and in support of this position, the defendant's counsel relied upon the fair construction of the act of 1791, which enacts, "that all sheriffs shall have "ten days after the return day, to settle their accounts and "make their returns to executions."

That no sheriff could be compelled to return an execution, till the 10th day after the return day; consequently, the year and day for issuing a new execution, must be computed from the end of this 10th day, which is its last day in court. Admitting this to be the true construction of law and practice upon this subject, it was then contended, that the injunction obtained out of the court of chancery, was on the 1st of *April*, 1797, when the execution had one day in bank, for its return; then it was, that this injunction arrested and stopped all the proceedings below; and from that period, till the month of *October* following, every thing at common law remained suspended by the act of the defendant himself, so that no part of the time of this suspension could be taken into the computation. The plaintiff, therefore, it was said, had until one day after the dissolution of the injunction, to renew his execution if it had been necessary. But as there had been a levy made on defendant's property, particularly on the negroes, soon after it was lodged, there was no occasion for the renewal of the execu-

Gibbes v. Mitchell

tion, because it is a well known rule of law, that the levy by a sheriff, under a *fi. fa.* devests the property out of defendant, and vests it in the sheriff; so that he may sell it at any time afterwards when he pleases; even after he is out of office. The conduct therefore of the sheriff in proceeding to advertise and sell the property, on, or immediately after the injunction was dissolved, was regular, and perfectly consistent with the rules of law, and that the defendant should not be allowed to come in and take advantage of his own wrong; a delay occasioned by his own act.

This being a new point, and turning very much upon the practice of the court, the judges took an opportunity of consulting the prothonotary, who had been an old and experienced practitioner at the bar, and he reported to them, that the ancient practice in this state had been, to compute the time that an execution had to run, or in other words its active energy, before a renewal of the judgment by a *sci. fa.* was necessary, was from *its last day in court*, whatever that was; and not from *the day of lodging it in the sheriff's office.* That divers acts of assembly, had at different times altered or varied the time for returns of executions; but whatever variations there might have been, the last day in court was the time from which a calculation was to have its commencement; for it often happened, that an execution was lodged in the sheriff's office, one or two months before the time of its return; and the sheriff could not be compelled to make such return, till the last day allowed by law, for that purpose; and until this return was made, it could not appear that the judgment was unsatisfied; for these reasons, the court had been in the practice of making all its calculations from that time.

The court after this information from the prothonotary, and from the nature and reason of the thing, upon principles, was of opinion finally, that the termination of the last day which an execution had in court, and not the day of lodging it in the sheriff's office, was the period from which the calculation of the year and day was to commence; and

that a year and day for renewal of the judgment by a *sci. fa.* must expire from that time, before the law would presume that the judgment was satisfied. That the ten additional days allowed by the act of 1791, to the sheriffs for settling their accounts, and making the returns of all executions, justified the principle of this construction; because in general, plaintiffs did not press their executions till the last period necessary by law, for compelling payment from their debtors; and as in general, a great number of executions were put into a sheriff's hands, just time enough by law for advertising and selling the property of defendants, it was but reasonable, that a few days should be allowed the sheriff to make his title deeds, and collect the money before the final return of an execution, which was to be binding on himself, and all the parties; hence the policy of the law of 1791, for allowing these additional ten days of indulgence beyond the return day of the court, for the return of all executions.*

With respect to the operation of the injunction out of chancery, it did not alter or vary the right of the plaintiff in the least, for the moment it was dissolved, it left the cause exactly in the same situation where it found it; and that in all cases where executions have been suspended by injunctions out of chancery, or writs of error, or the like, there was no occasion for a renewal of the judgment by a *sci. fa.* 2 *Burr.* 660. one of the ends of a *scire facias* before suing out an execution, was, to guard against a surprise upon the defendant. But surely, he ought not to be allowed to take advantage of a delay, which he himself had occasioned, by taking all methods to effect it.

1 *Str.* 301; 1 *Salk.* 322.

As the execution in this case, had one day in court when the injunction suspended it, the plaintiff had all that day to have renewed his execution, if he had thought proper; or if the law had rendered it necessary. But the court was of opinion, that such renewal was unnecessary, for the she-

* This is contrary to the *English* practice which calculates the year by calendar months, 1 *Str.* 301. but the alterations made by our acts of assembly, justify the deviation from the practice in *Westminster-Hall.*

Gibbes v. Mitchell.

riff had, by virtue of the execution, made a regular levy on defendant's property on the 22d of *March*, 1796, which gave him a qualified property in the negroes; so that the moment he was unfettered by the injunction, he had a right to go on and complete the sale, and raise the money; nay, he not only had a right to go on, but was bound to do so, even if he was out of office at the time, for he who begins must end the execution. 1 *Salk.* 323. 2 Ld. *Raym.* 1074.

Rule discharged with costs.

Present, BURKE, WATIES and BAY.

Charleston District, 1798.

FABRE *against* BOWER.

Attachments issued by magistrates under the act of 1788, are to be returned into the prothonotary's office, and proceeded in agreeable to the old attachment act of 1744. The rules and practice of the county courts are not applicable to them.

CASE on attachment.

The attachment in this case, had been issued by a justice of the peace, under the act of 1788, and returned into the clerk's office of the court of common pleas, and a judgment obtained against the garnishee, for not making a due return to it, agreeably to the terms of the old attachment act.

A motion was made, by Mr. *M'Call*, to set aside this judgment because there had been no previous order of court made, for the garnishee to make his return, agreeably to the 4th clause of the county court act, passed in 1785, which required such order.

Mr. *Trezevant*, contra, said there was no occasion for such order in the present case, for this attachment had been issued, under the act of 1788, which authorized justices of the peace in districts where no county courts were established, to issue attachments in certain cases, and to make

them returnable to the court of common pleas, where the proceedings were to be agreeably to the attachment act; and this act required no such order, but made the garnishee liable on making default, in not making his return on oath, on the return of the writ.

He admitted, that the county court act required an order of court to be made on a garnishee, in cases commenced in those inferior courts, as contended for by the gentleman in favour of the motion in the present case; but he said in cases, such as the one before the court, the county court act had no bearing upon it; it had nothing to do with it; this case depended on the act of 1788, and the attachment act of 1744, and steered entirely clear of the county court act of 1785.

The *Attorney-General* observed, that the act of 1788, was intended to enlarge the old attachment act of 1744, by enabling magistrates to issue attachments, where persons were in *the act of removing* out of the state, and were likely to be without the jurisdiction of our courts, before a writ could be obtained from the prothonotary's office of the court of common pleas. But when that writ was once served, it was to be returned into the prothonotary's office, and the case proceeded in, against all persons concerned, agreeably to the attachment act of 1744.

By the Court. The confusion which has so often arisen in cases of this kind, has been owing to the practitioners of the bar, blending all these acts together, and considering them as made in *pari materia;* whereas, they are distinct in their nature and objects. The county court act, created new jurisdictions unknown in law before, and regulated the practice in those jurisdictions; they are local in their nature, and circumscribed in their limits; and the rules prescribed in the act of 1785, are peculiarly adapted to those inferior courts, and to them only. Whereas, the act of 1788, was auxiliary to, and came in aid of the old attach-

Fabre v. Bower.

ment act of 1744, by enabling magistrates to issue out writs of attachment in certain cases mentioned in the act, and to make them returnable into the court of common pleas, where they were to be proceeded in, agreeably to the terms of this last-mentioned act.

Rule to set aside the judgment discharged.

Present WATIES and BAY; BURKE and GRIMKE, not present at the argument, but afterwards concurred in this decision.

Charleston District, 1798.

CHARLES BROWN *against* The Rev. THOMAS FROST.

Nonsuit. The correct rule of law in such case is where there is a total failure of evidence or testimony, or only light or trivial presumption to support an action, the judge ought to direct a nonsuit, as it would be a nugatory thing to send such unsupported cause to a jury.

But where there is testimony, though of a doubtful nature, or depending on a long train of circumstances, or on facts contradictory in themselves, or which admit of different interpretations; in such cases the court should send the case to the jury, to determine between the parties, and not cut the plaintiff off from a chance of justice.

Jurors are the constitutional judges of facts and circumstances, and it is not for the court to infer that their verdicts are wrong, unless some rule of evidence or principle of law is violated.

But in very intricate and doubtful cases, notwithstanding the finding of a jury, the judges will, in the exercise of their extraordinary discretion, in some cases order a new trial, that the ends of justice may be the better ascertained.

TRESPASS to try title to land.

This was an action of trespass to try title to a tract of land near *Georgetown*, before Mr. Justice BURKE, in which there was a verdict for the plaintiff.

The present was, therefore, a motion for a new trial, on two grounds: 1st. That the judge ought to have ordered a nonsuit on the trial, and should not have permitted the case to have gone to a jury; and, 2dly. That the verdict or finding was without evidence to support it.

From the report of the judge, it appeared that the titles of both the parties in this case were of an ancient origin, and were traced down through a number of claimants and proprietors, to the parties in this suit, and both claimed by deeds of conveyance either actually produced or accounted for.

They both claimed under Landgrave *Thomas Smith*, who had a barony of 24,000 acres of land granted to him, by the former lords proprietors of *South Carolina*, in that part of the country, and the land in question was a part of this barony, which had been by him, or his heirs or representatives, divided and subdivided into a great number of portions or subdivisions among the numerous branches of his family, who, on their parts, again sold out their proportions to various purchasers, at different periods, as best suited their convenience.

The defendant, on his part, produced regular conveyances down from the landgrave to the party under whom he claimed, but was not able sufficiently to fix the location, or shew in what part of the barony the land he claimed was situated.

The plaintiff, on the other hand, was more fortunate in ascertaining his location, and in shewing where the land he claimed within the barony lay, by different surveyors, and also by witnesses who proved and identified the land in possession of several of the parties through whom he claimed his title. But in the course of the evidence offered on the trial, it appeared that the deeds which formed one of the links of his chain of title was wanting; that is to say, the conveyance from the landgrave to his son-in-law, *Benjamin Waring*, through whom the plaintiff claimed, was not to be found; all the others were regular and substantiated, agreeably to the rules of law. As soon as this defect in the evidence in support of the plaintiff's claim was discovered, the defendant's counsel, Mr. *Edward Rutledge*, moved for a nonsuit, which was opposed by the plaintiff's counsel, who stated to the court, that his client would prove the existence and loss of the deed wanting, to the satisfaction of the jury. The presiding judge, therefore, refused the motion for a nonsuit, and permitted the plaintiff to go into this kind of testimony. The plaintiff then proved by one or two witnesses, that Mr. *Allston*, who was executor of one of the ancestors of one of the parties under whom he claimed, during

Brown v. Frost.

the revolutionary war, had his dwelling-house destroyed by fire, and among other things lost a number of valuable papers; (though some of them were saved;) that he complained much at the time of the loss of his papers, and of some of his title deeds for his lands. *Among the few saved and preserved from the flames*, one deed was *found and produced*, which *recited this deed of conveyance wanted*, from the landgrave to his son-in-law, *Benjamin Waring*. Upon this testimony to the jury, the plaintiff said he was willing to rest his cause.

At this stage a nonsuit was again called for by the defendant's attorney, but the judge a second time refused it, and permitted the cause, under all the circumstances of the case, to go to the jury, who found a verdict for the plaintiff.

In support of the present motion, the *Attorney-General* and Mr. *Edward Rutledge* contended, that the judge should have ordered a nonsuit to have been entered, as so material a link of the chain of title was wanting. That from the plaintiff's own shewing, he said he proved the land originally to have belonged to Landgrave *Thomas Smith*, and as no conveyance was produced from him, the law would infer that the land was still vested in his heir at law. That every man in this action must recover by the strength of his own title, and not by the weakness of his adversary's; and if he shews himself, or it is proved by the defendant, that the title is in another, it is sufficient to destroy his right of action. That, therefore, upon this ground, the judge who tried the cause should, in the first instance, have directed the nonsuit moved for. But admitting that he had a right by law to go into the suppletory evidence contended for, he had totally failed in proving the existence or loss of the deed wanting. It was hardly necessary for him, he said, to urge the rules of law, which were so well and universally known, with regard to the loss of deeds. That the party must prove, 1st. That such a deed once existed; 2d. That it has been lost or destroyed, and that diligent search has been made

for it in a proper place, and that it cannot be found; or, 3d. That it is in the hands of your adversary, who refuses to deliver it. After this is done, you may give a reasonable proof of the contents of such deed, or offer a copy in evidence. But, he asked, had this been done in the present case? He was bold to say it had not. No proof was offered by any person who ever saw this deed. That a house was destroyed by fire, he admitted; and that some title-deeds for land might have been destroyed, he also admitted; but there was no proof that this deed (wanting) was among those which were so destroyed. It was true, he said, that a deed said to have been among those saved, contained a recital of a deed from Landgrave *Thomas Smith* to *Benjamin Waring*; but this, he contended, was too vague and indefinite even to raise the slightest presumption upon. No copy was offered in evidence from the records, nor the least testimony of the contents of it. It was a bare recital of *Benjamin Waring* himself, under whom the plaintiff claims. There was nothing, therefore, from the whole of this suppletory testimony offered, to raise a presumption strong enough in law to justify the judge in leaving it to the jury to determine whether this deed ever existed or not? or whether it was destroyed or not? or even whether its contents amounted to a transfer of the land in question from the landgrave to *Benjamin Waring* or not? If, therefore, the whole of this unsubstantial fabric vanishes in air, what was there to submit to a jury? Not one circumstance of sufficient solidity had been offered, that came within any one of the rules of evidence.

Brown v. Frost. 3 *Will.* 553.

A nonsuit, therefore, upon the second motion, ought clearly to have been ordered, as soon as this suppletory evidence closed. And the judge, in refusing it, and submitting to the jury this kind of unsubstantial testimony, was guilty of misdirection. And for this purpose he relied on *Cowp.* 214. where the judge (Baron *Eyre*) left it to the jury to determine, whether 37 years non-payment of quit-rent did not amount to presumptive evidence that it had been re-

Brown v. Frost.

leased or extinguished; and the jury found that it did. This was deemed a misdirection in the judge, and a new trial was ordered on the ground of this misdirection, and because the verdict was against law.

Again, he said, a verdict *without any evidence at all*, as in the present case, or *against plain evidence*, or against law, ought not to stand; there ought to be a new trial. 3 *Burr.* 1525.

Mr. *Johnson*, in reply, observed, that it would have been denying the plaintiff a manifest right, to have deprived him of the benefit of the evidence offered, to prove the existence and loss of the deed in question, by ordering a nonsuit in the first instance; and still more so, after it was offered, to have taken it from the jury, and cut him off from the benefit of their verdict, by granting the second motion, without submitting it to their consideration. He admitted, that in cases where there was a total defect of evidence, the court would and ought to order a nonsuit. But, in this case, a great deal of evidence had been offered to the jury, both oral and written. In the first place, a regular chain of titles had been traced up from the plaintiff in this action to *Benjamin Waring*, the son-in-law of the old landgrave. All these had been delivered over to the plaintiff by the party from whom he purchased, which was strong presumptive evidence of the right, because ancient title deeds generally accompany the right to the freehold; and only a single link was wanting to carry it up to the landgrave himself. In the next place, it was proved, that the dwelling-house of the executor of one of the ancestors of one of the parties under whom the plaintiff claims, had been destroyed by fire, and among other things, a number of deeds and papers, and that the owner of the house complained, at the time, of the loss of some of his papers and title deeds for his lands, at a time when he was smarting under his losses, which could not have been intended to bolster up an unfounded claim at some future day, but expressed with the utmost sincerity of soul to his

neighbours at the time of his calamity. And, lastly, it appeared from one of the deeds saved from the flames, that this deed from the landgrave to *Benjamin Waring* was particularly mentioned and recited, as a deed which had been made and executed with all due and legal solemnities. This was also an ancient deed, and could not be supposed to have been fabricated for the purpose of supporting the plaintiff's present suit. All these circumstances, he said, formed such a mass of testimony, as could not well be resisted; and it would have been the height of injustice to have withheld it from the jury, by ordering the nonsuit. The presiding judge did, therefore, what was proper and right in submitting the whole to the jury, to form their conclusions upon them; and having done so, there are no grounds to call their verdict in question.

It cannot, therefore, be said to be a verdict without evidence, for there was a great deal of evidence offered. Nor one against evidence; that is not alleged. Nor is it a verdict against law; for if the jury were of opinion the deed in question ever existed, and was lost, it was a finding warranted both in law and in fact. They were the constitutional judges of facts, and where law and facts are blended together, their finding is conclusive and binding; and having done so, there are no legal grounds for setting their verdict aside.

The Judges, after hearing arguments, were of opinion, that where a link of a long chain of titles is alleged to be lost or destroyed, as in the present case, a considerable degree of latitude was perfectly allowable, in order to reach the justice of a case of this complexion. They were, therefore, clearly of opinion, that the presiding judge did right in not ordering a nonsuit in the first instance. The correct rule of law, in cases of this sort, they took to be this: that wherever there was a total failure of testimony or evidence offered to a jury in support of an action, there it was the duty of the judge to order a nonsuit, because it would be a nugatory act to send

Brown v. Frost.

such an unsupported cause to a jury. But wherever there was testimony, although of a doubtful nature, or a train of facts which were contradictory in themselves, or which admitted of different interpretations; in all such cases, the court ought to send it to the jury, ultimately to determine between the parties. In cases, too, where the general issue is pleaded, juries have a great latitude, and may even find a *deed* of themselves, if they know it, although not shewn by either of the parties. So also they may find a *matter of record*, though not shewn in evidence, (contrary to opinions formerly held on this subject,) and as they may find such record, so, by parity of reasoning, they may take instruction concerning it, *from every circumstance which carries the appearance of truth.*

Plowd. 410, 411.

Upon these grounds, also, the judges were of opinion, that the presiding judge acted properly in not ordering a nonsuit on the second motion for that purpose, but was regular in sending it to the jury, after the suppletory evidence was given. What were the points then submitted to them? Why, whether this deed (supposed to have been lost or destroyed) ever existed or not; and, secondly, if it did, whether its loss was sufficiently accounted for or not. These were facts very proper for their consideration; they were, under all the circumstances of this case, fairly and regularly submitted to them, and this court has no legal grounds to say that their verdict is either against law or evidence.

1 *Burr.* 397.

But the judges said they had a discretionary power of ordering new trials in cases of great intricacy or doubt, for the attainment of justice, without invading the province of a jury on the one hand, or of impeaching verdicts upon legal grounds on the other. And this case appeared to them to be one of this complexion. The parties all claimed under one of the earliest grants made by the former lords proprietors of *South Carolina*, and by ancient conveyances. That the subdivisions of this barony were made by surveyors of the parties' own choosing, and there might be much light thrown upon the location of the lands mentioned in the de-

Brown v. Frost.

fendant's deed, which appeared to be involved in much doubt and obscurity. That there was still some doubt and uncertainty on the part of the plaintiff, about the existence and loss of the deed from the old landgrave to *Waring*, notwithstanding the finding of the jury, as the only mention made of it was the recital in another deed, not between the same parties, but by a person interested in the establishment of this *deed* to himself.

For all these reasons, they thought it for the furtherance of justice to order a new trial, that this case might be tried before *another jury*, who probably may not have heard *so much of the case as the one who tried the cause;* and the more especially, as it would, in that case, be only putting the *defendant* exactly in the situation in which the plaintiff would *have been*, if the verdict had been in the *defendant's favour;* for in that event he would, as a matter of right, have been entitled to another action, under the act of 1744, without impeaching the verdict of a jury.

Rule for new trial made absolute, without costs.

Present, BURKE, GRIMKE, WATIES and BAY.

The Rev. THOMAS FROST *ads.* CHARLES BROWN.

TRESPASS to try title to land.

Where a third trial is moved for, the court will very rarely grant it, after two concurring verdicts in favour of the plaintiff, unless some plain rule of evidence or principle of law is violated.

This was a second trial at *Georgetown*, for the same tract of land mentioned in the foregoing case, in which defendant was the principal actor, the plaintiff in the former case having had a verdict in his favour. This second action was tried before Mr. Justice GRIMKE, and the circumstances varied little from those mentioned in the former trial.

The same evidence was offered, and the same motions for nonsuits were made, at different stages of the case, as

Frost ads. Brown.

had been made on the former trial, but overruled for the same reasons, as the presiding judge did not wish to deprive the plaintiff, in his second trial, from an opportunity of going fully into the case again. But a new ground was taken, which had not been urged on the former trial, to wit, that this action would not lay, because the plaintiff had lost his right of entry, as he had never commenced any action, or made any entry, either himself or by those under whom he claimed, for more than sixty years last past. That the plaintiff is bound to allege seisin of the lands and tenements in himself, or in some one under whom he claims, and then derive the right from the person so seised to himself, and that too within sixty years, otherwise the demandant and his heirs, and all claiming under him or them, are perpetually barred of their claim.

3 *Black. Com.* 195.

To this it was replied, that the writ of right never was in use in this country; it was a remedy for the recovery of lands, which had never been extended by our ancestors to *Carolina;* therefore, never could have been considered as a part of the common law of *Carolina.* The only action in use from the first settlement of the country, till the year 1791, was the action of ejectment; when that act changed this fictitious action into the action of trespass, to try titles to lands. That our limitation act passed in 1712, had altered the common law of *England* in this respect, even if it could be said, that it had ever extended to it, and had fixed no time or limitation to the commencement of suits for the recovery of lands in this country, except in cases where there was an adverse possession: in such case it required that the action should be commenced within five years, otherwise the plaintiff as against such actual possessor, would be forever barred; but even in such case, the law did not make it necessary that the plaintiff should enter and gain actual seisin, before suit brought; the right and title alone, is sufficient to maintain the action.

See the act of 1791, for changing the action of ejectment into treepass; also the note to the case of *Lynch* ads. *Withers, ante,* p. 115.

The cause was afterwards submitted to the jury, and a second verdict was given for the plaintiff.

Frost ads. Brown.

The present was therefore a motion for a third trial; when all the grounds which had been taken on the first and second trials, were again urged by the counsel on both sides; on this motion, the only material difference was, the last ground taken on the second trial, to wit, that the plaintiff had lost his right of entry, as he had not commenced his action within sixty years; this was a new ground, and the first time it had been taken in the judicial history of this country.

Two of the judges were against a third trial. Mr. Justice WATIES delivered the opinion of Mr. BURKE, and his own, as follows:

WATIES, J. A third trial has been moved for in this case, on the part of the defendant, after two verdicts for the plaintiff; and the grounds on which it is moved, are, that the finding of the jury has been contrary to the limitation act, and the rules of evidence. The doctrine of law respecting new trials, has been so frequently considered, and the rules on the subject so fully settled and understood, that, it appears to me, nothing now remains in the discretion of the judges, but to make an application of these rules, to any particular case that may come before them. After having exercised my judgment in this manner, I am of opinion, that the defendant is not entitled to another trial. The objections made to the verdict have been urged with much ability, and some of them have, no doubt, great weight; but they do not appear to me, to be sufficiently strong, to warrant us in setting aside this second verdict, after the liberal indulgence shewn on the former motion in favour of the defendant.

It was contended, that this action was not maintainable, because the plaintiff had lost his right of entry, having never

The writ of right never was in use in this country, nor continual claims for lands, &c. Ejectment or trespass (the only actions for lands) will lay, although plaintiff never entered, or any person under whom he claims, within sixty years before commencing such suit. It is only necessary to bring suit in this state, to establish a claim to lands where there is an *adverse possession*, under the limitation act; otherwise a right will not be defeated by length of time.

Frost ads. Brown.

brought any action or made any entry on the land, either by himself or by those under whom he claimed, for more than sixty years; and that the want of an adverse possession during that time, did not excuse him.

There is no doubt, that in *England*, the loss of a right of entry is a bar to an action of ejectment; but I do not believe that a case has ever occurred there, in which this was allowed, where there was not an adverse possession existing. But it is not material to ascertain what would be the determination of an *English* court, in a case like the one before us; for it is very clear to me, that agreeably to our act of limitation, and the practice under it, the plaintiff has not lost his right of entry; and that this right, can only be taken away by an adverse possession under the act. Our action of ejectment, or the action of trespass substituted in the room of it, is adequate to every end, and possesses all the advantages of every real action in *England*, from an ejectment to a writ of right; and neither a descent cast, nor a want of entry, nor the omitting to bring an action within five years, will be any bar to it, if there has been no adverse possession running against it.

This is known to be the constant practice, and we see in court every day, lands recovered which are claimed under ancient grants, of which the plaintiffs never had possession; and the right to which had accrued many more than five years before bringing the action; and this appears to be the intention of the act. It requires that an action should be brought within five years for the recovery of land, after the right to it accrues. But how is an action to be brought, if some person is not in possession? How is the writ to be served? If the legislature had intended that a claim should be made every five years, whether there was an adverse possession or not, it would have prescribed some mode of making this claim on the land; but its requiring an action to be brought, necessarily implies that there must be an adverse possession to found it on; and that without this, no lapse of time will take away either the *right of entry*, or

right of property. Verdicts without number, have been found agreeably to this construction of the act, and it has now become a rule of property; we should not be at liberty to overturn it, even if it was erroneous.

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Another ground on which this third trial is moved for, is, that the verdict has been found against the rules of evidence. An objection of this sort, ought always to command the serious attention of the judges. It is of infinite importance, that the laws should have a steady and uniform operation; for in this chiefly consists the freedom of our government, and the substantial liberty of every citizen. If therefore, it appeared to me, that any clear and fixed principles of law was violated, I should not hesitate in granting a third trial, or even a fourth, but I do not see that this is the case before us. It appears to me, that the verdict is not inconsistent with the rules of evidence, and if we should set it aside, I think in this instance we should be intrenching on the constitutional and rightful province of the jury. From the report of the judge who tried the cause, (as in the former case,) it appears, that the titles of both the parties were of ancient origin, and both of them founded on deeds. Each one claimed under Landgrave *Thomas Smith.* The defendant shewed an unbroken chain of titles, and the only uncertainty in his claim, was, as to the *locality* of the land.

The plaintiff's deeds were all regular up to *Benjamin Waring*, a son-in-law of the landgrave; but a conveyance to him from the landgrave was wanting. The plaintiff, however, offered a variety of circumstances, to prove the existence of such conveyance, and the loss by fire; which the judge suffered to go to the jury: and the jury have presumed from these circumstances, that such a deed did exist, and was lost, and have therefore found for the plaintiff.

There are two things to be considered. 1st. Whether such kind of evidence is legal, or not? 2d. Whether it was properly left to the jury or not? There can be no doubt as

Frost ads. Brown.

to the first point; it is very clear, that the existence and loss of a deed, may be presumed by a jury from circumstances; all the cases quoted on both sides, recognise the principle; and the only control which the judges have over the right of the jury, is, to require that there shall be some ground to raise the presumption upon; and that this ground shall not be a light and frivolous one. But if the circumstances offered in evidence are thought of sufficient weight to be left to a jury, and they presume a fact from them, we have no power afterwards to judge of the strength of them, and to say that the verdict is not well founded; to do so, would be to control the judgment of the jury, on the sufficiency of evidence legally determinable by them; which would be to subvert a fundamental right.

With respect to the second point, I think the circumstances were of importance enough to be left to the jury. It is true, that the recital in the missing deed, in *Benjamin Waring's* deed to *George Smith*, was no legal proof of itself, of the existence of such a deed; nor was any other single unconnected fact, alone, which was given in evidence; but it appears, that they were offered only as *circumstances*, which collectively taken together, and weighed, might amount to such proof; and in my opinion, they deserved the consideration of the jury. The recital in Mr. *Waring's* conveyance to *George Smith*, of the missing deed; his relation to the landgrave, and connection in the family; the attestation of some of the same family to this deed; the continued conveyances of the land, from that time to this, through a great many hands, many of whom have paid a valuable consideration for it; and many other circumstances stated, were worthy of consideration. There was one which I do not recollect was dwelt upon in the argument, that I think of great weight: each party, it appears, disputed the location of the other's claim, and the surveyors differed about it; but the jury have found that the plaintiff's location was right. It must be admitted, that they were (as to this point) the exclusive judges; it was a fact for their determination only; they

have ascertained, then, *that the land conveyed by Benjamin Waring, is the land in dispute;* and that the land to which the defendant is entitled, lays elsewhere. It is true, that the plaintiff must supply by legal evidence, the want of a conveyance from Landgrave *Smith* to *Benjamin Waring*, or he cannot recover; but if the verdict ascertains the fact, that the land in dispute is not that which has been conveyed by the landgrave to the defendant, but that his land lays elsewhere, it follows, that the land in dispute must either have been conveyed by the landgrave to *Benjamin Waring*, or to some other person, or not conveyed at all; as no other claim however appears, and probably no other exists, it may reasonably be inferred, that this land was conveyed to *B. Waring;* it is at least a strong circumstance, concurring with many others, on which I think a jury were legally authorized, to raise a presumption of this fact.

First eds. Brown.

An objection was made to this kind of evidence, that it was only admissible to support a right in possession; but never to defeat such a one. I admit that possession is highly favoured, by the law, and perhaps a presumption in support of it, would be preferred to one of equal weight against it. But I have no doubt that it may be good evidence against possession, and may be raised from circumstances strong enough to defeat it; there is no good reason why it should not. Presumption is allowed to prove facts, even in criminal cases; and one of the highest modes of proof, is, to shew the existence of circumstances which could not have existed, if the fact to be proved had not pre-existed. And what is this kind of proof but presumption? A single circumstance may have little strength, and of itself afford no foundation; but when joined to many more of the same nature, all fitting each other, and having the same relation, the whole united, may form an arch strong enough, to support a presumption of the most important fact. After all, if the objections to this verdict had much more weight with me, than they have, yet I would not disturb this last verdict, for another reason. A second trial has already

Presumption is allowed to *prove facts*, arising from circumstances which could not have existed, unless such facts had pre-existed.

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been granted, and two special *juries have concurred* in finding the same facts; I think we have no authority to interfere any further. For although I would never surrender a plain and certain rule of law to the caprice of a jury, or any number of juries; yet in a case where the law is complicated with facts, so that the construction and application of it, must depend on the finding of facts, two concurrent verdicts even against the opinion of the judges, ought to be conclusive. As the present case appears to me to be such a one, I think a third trial ought not to be granted.

BURKE, J. concurred with WATIES, J.

GRIMKE, J. contra. Although he had sent this cause to the jury on the second trial, yet it was done under a charge, that he did not think any one part of the evidence offered to supply the existence and loss of the deed, came up to the rules of evidence required on such occasions; and if so, then any combination of unsubstantial parts, could never remedy the defect, and his reasons were these. In the first place, it is a well known rule of law, that a plaintiff must recover by the strength of his own title, or fail in his action. It is no matter how weak his adversary's may be, for unless he can make out his claim, it falls to the ground; for possession gives a man a right to hold against every man, who cannot shew a good title, 4 *Burr.* 2487. Has the plaintiff done so in the present case? no, he has not; he has failed in one essential link of it, that is in proving the conveyance *from Landgrave Smith the original grantee*, to *Benjamin Waring*. Here he has stumbled at the threshold of his cause, and in no part of his testimony, has he ever been able to get over it. It is to be recollected, that the plaintiff has endeavoured to make out his title, by regular deeds of conveyances from the original grantee down to himself. One of the first rules of law in the production of deeds of conveyance, is, that you must produce the deed itself in evidence to a jury, and must prove it by one wit-

ness at least, *Bull. N. P.* 254. The next rule is, that if the deed is in the hands of the opposite party, who upon being called on, refuses to produce it, a copy of it will be good evidence; so where it is proved that the deed is *lost by fire*, or other accident, a copy of it may be given in evidence; and if you have no copy, you may give parol proof of the contents. Now how have these rules of law been supported by the evidence in the present case? It is not pretended that any deed is even in existence; nor a copy of it, nor any record of it to be found; but it is alleged to have been lost, when Mr. *Allston's* house was consumed by fire. Is there any proof that it ever did exist, or that the landgrave ever executed it, or that he ever in his life-time, directly or indirectly, acknowledged that he had executed such a deed, or that it ever came into Mr. *Allston's* possession? or that it was in the house that was consumed by the fire? or that Mr. *Allston* ever acknowledged, that such a deed had been destroyed? Not one *scintilla* of evidence has been offered, to prove or substantiate any one of these important facts: so far then he was bold to say, that the existence and loss of this pretended deed was totally unaccounted for, by any one known and established rule of law.

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The next principle of law resorted to, in support of this deed, *was a recital* in the deed from *Benjamin Waring* to *George Smith*, under whom the plaintiff claims; let us examine this principle, and see how it will bear the plaintiff out in his title. "*A recital is the making mention in a deed "or writing, of something which has been made or done be-"fore.*" 2 *Lill. Abr.* 416. This like all other acts done by a man, is good evidence against *himself* and all claiming under him, but is no evidence *for himself;* otherwise a man might fabricate as many deeds as he pleases, and make as many recitals in them as he pleases; and if they were permitted to be evidence of pre-existing rights, a man might carve out to himself, any, or as many titles as he thought proper. Therefore the law has very wisely laid down this rule, to guard against the bad effects of recitals in deeds of conveyance. A recital is not conclusive, because

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it is no direct affirmation, and by feigned recitals in a *true deed*, men might make what recitals they please, since false recitals are not punishable. 1 *Inst.* 352. 2 *Lev.* 108. Again it is laid down, in 2 *Lill. Abr.* 416. the recital of one lease in another, is not *a sufficient proof that there was such a lease, as is recited, Vaugh.* 74, 75. without producing it, or the enrolment of it. 2 *Lev.* 109. But the recital of a lease, in *a release*, is good evidence of a lease against the releasor, and those who claim under him, *Mod. Cas.* 44. *Lill. Abr.* 417. Again it is laid down, that a recital cannot make a first lease good, which was not good before, or put the party in a better condition than he was in before, *Dal.* 13. pl. 23. *Com. Dig.* tit. *Recital.* From these numerous authorities, it is most evident, that a recital in a deed is no evidence on behalf of a man, although it may be good against him; as recitals in a deed for transferring property respecting the grantor's estate, will by construction of law, amount to a covenant or agreement, that he is entitled to the property he recites. 1 *Powell on Contracts.* 235. Now examine the recital under consideration. 1st. Who is it made by? the answer is by *Benjamin Waring*, under whom plaintiff claims in his deed to *Smith.* In this deed he recites a deed from the landgrave to himself. Is this then not giving himself a title by his own recital in his own deed to *Smith.* Is this not carving out to himself, by his own act, a title in a mode and manner, which all the above authorities go to prove amount to nothing. It is, as Mr. *Plowden* says, mere babble. Mr. *Brown*, the present plaintiff, might as well have gone into court, and told the jury the land was his, and he had a right to it, for that *Smith*, under whom he claims, had a right to it, because Mr. *Waring* who sold it to *Smith*, said he had a right to it. Would this jargon have been any evidence of title to a jury? It would have been an insult offered to their understandings, to have told them so. In all this business, the landgrave is a passive agent; nothing is shewn from him, to prove that he ever parted with his right; not even a recital in any deed existing. If even a recital in any

Trials per Pais, 392.

deed from him, to any person whatever, had been produced then it might have gone to the jury, as presumptive evidence that he had parted with his right; but nothing of that nature was produced or shewn; not even parol testimony of it. The fabric which has been erected on this recital, like the existence and loss of the deed, vanishes in air, and leaves not a wreck behind, to build even a presumption upon.

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Presumptions, to deserve the countenance or support of a court and jury, must have something to support them; something to stand upon; some strong leading facts should have been proved in the case, from whence the jury would be warranted in these conclusions; but here there were none. Where possession has gone along with the land for a number of years, it is strong presumptive evidence that there must have been a grant for it, which may have been lost by time or accident. So deeds and other evidences may all be presumed by length of possession; but in the present case, it is not even pretended that the plaintiff was ever an hour in possession: on the contrary, the defendant is in possession, the law supposes him in possession of the premises. This presumption, therefore, is not to support a right already enjoyed, but to defeat one; and presumptions in support of a right, are always to be preferred, to those which go to destroy a right. Upon the whole, he said, that so strongly impressed was he, that there was nothing to support this action offered to the jury, that he would have directed a nonsuit, had not a respect to the opinions of his brethren on the first motion for a new trial, prevented him from directing it on this second trial, as soon as the parties had closed their testimony on both sides. In his charge, however, to the jury, he had given his sentiments very fully; but the jury thought proper to find against his opinion, and as he was well assured in his own mind, that there was no evidence to support the verdict, he thought it ought to be set aside, and a third trial ordered.

Lessee of *Alston* v. *Saunders*, *Bay's Rep.* vol. 1. p. 26. *Riley's* edit.

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With regard to the writ of right, he readily accorded with his brethren, in opinion, that such a kind of procedure was never in use in this country; and that the omission to bring an action within sixty years, was no bar to the action of ejectment, or trespass in this state, which might be commenced at any time, or given period, after a right accrued; except in cases only where there was an adverse possession; then within five years after such possession commenced, otherwise the plaintiff's right was gone under the limitation act.

BAY, J. agreed in opinion with GRIMKE, that this second verdict ought not to stand, as there was no legal evidence to support it; and it was of great importance to the landed interest of this country, that these rules of evidence should not only be well known, but always rigidly adhered to, as the stability of the titles of the freeholders of *Carolina*, depended very much upon them. No part of the testimony offered in this case when taken separately, proved the plaintiff's right; and when taken collectively, they were so disjointed, and unconnected, as rendered it impossible for them to stand together. But upon the last point of the case, he perfectly agreed with his brethren, that the not bringing of an action of ejectment or trespass *within* sixty years, did not bar the plaintiff's right of bringing it at any period after the expiration of that time; there was nothing which could stand in his way but an adverse possession, which under our limitation act, might be pleaded in bar to his recovery.

The judges being equally divided in opinion, the plaintiff took nothing by his motion.

Rule for new trial, was of course discharged.

DAVID RAMSAY *ads.* JOHN L. GERVAIS.

Charleston District, 1798.

DEBT on bond of indemnity. Judgment by default.

Motion to set aside this judgment, in order to let the defendant into a defence, that he was not liable on this bond till the plaintiff had actually paid the money.

Upon a bond of indemnity, the obligee is not obliged to wait till he is compelled to pay the money for defendant; he may bring his suit the moment the first breach happens, in not performing the condition of the bond.

The facts in this case were these: The plaintiff, Mr. *Gervais*, at the request of *D. Ramsay*, had indorsed a note for him in the national bank, for two thousand dollars; and at the time of indorsement, took a bond of indemnity from him, to save himself harmless from and against all the consequences and damages, &c. which might arise from this indorsement. The note was discounted in the bank, and when the time of payment came round, it was protested for non-payment, and separate actions were brought for recovery of the amount, one against the drawer, and the other against the indorser. As soon as the plaintiff was sued on his indorsement, he commenced his action on the bond of indemnity against the defendant, and obtained judgment by default upon it.

The present was a motion to set aside this judgment, on the ground that the action was prematurely brought. In support of the motion, it was said, that the plaintiff could not be said to be damnified, till he had been compelled to pay the money; it was then, and not till then, that the actual damages accrued. That the defendant was still ready and willing to save him and his property, from any actual arrest or seizure, and would be prepared to pay off the debt, interest, and all costs, before any execution should be taken out against him.

But the court held, that the action will lay the moment the note was protested; for from that moment, the plaintiff became liable to pay the debt; the suit against him was one of the consequences of the protest; and that was one of the consequences against which the bond was meant to protect and defend him, in consequence of his indorsement.

Ramsay ads. Gervais.

The plaintiff was not bound to wait till the officers of the bank had levied on his property, and then to go through the slow process of the law, to recover the money from the defendant, who in the mean time might become insolvent. He was highly justifiable in endeavouring to raise the money from defendant, by all lawful ways and means in his power; and if practicable, to be beforehand with the officers of the bank, by levying on defendant's property, before they could levy on his effects, for the purpose of raising the money.

Motion dismissed.

Present, BURKE, WATIES and BAY.

Charleston District, 1798.

POWRIE and DAWSON *against* FLETCHER and PHILLIPS.

The private debt of one copartner, cannot be set off against the demand of the copartnership.

MOTION for a new trial.

This was an action of *assumpsit* for goods sold and delivered, to which the defendants filed a discount, for the amount of a bill for painter's work, done to the house of Mr. *Powrie*, one of the copartners.

The jury, contrary to the charge of the presiding judge who tried the cause, allowed the defendants the amount of their demand.

This was a motion for a new trial, which was ordered without argument, and that too without costs; as the jury did wrong in allowing the discount; the law being very clear, that the private debt of one copartner, cannot be set off against a copartnership demand.

Present, GRIMKE, WATIES and BAY.

JOHN FABRE *against* PETER ZYLSTRA.

Charleston District, 1798.

UPON a motion, to have the defendant admitted to the benefit of the insolvent debtors' act, and discharged from gaol.

Insolvent debtor not to be discharged where fraud is alleged against him till it is tried by a jury, in all cases of a complicated nature.

Bare allegations or suggestions of fraud, not sufficient to warrant the court to send a case to the jury. Affidavits containing the facts should be filed, on which the suggestion is to be formed.

But in cases which are not complicated, or where the whole case can be readily investigated, the judges will proceed in a summary manner, without the intervention of a jury.

This motion was opposed by the *Attorney-General* and Mr. *Ford*, on the ground that defendant had conveyed away a large stock of goods, and other valuable property, to one *Charles Baugniett*, who had formerly been his clerk, with a view of defrauding the plaintiff and other just creditors of their lawful debts; and therefore they said he was not entitled to the benefit of the insolvent debtors' act, on the ground of fraud. At all events they contended, that they ought to have a fair opportunity of investigating and trying this fraud, *if* it had been committed; and that it had, they had no doubt, from the information they had received from the plaintiff, as well as from sundry others of his creditors. They observed, that the act had not prescribed any precise form, for trying and ascertaining fraudulent conveyances and transactions of the kind alleged against the defendant in the present instance; and therefore suggested to the court the propriety of sending this case to a jury of the country, as most congenial to the principles of the common law, upon a suggestion to be filed for that purpose, containing the specific charges of fraudulent conduct on the part of the defendant; by which means he would be apprized of the particular allegations against him, and would have an opportunity of pleading to them, and of preparing for his defence.

Mr. *Gaillard* and Mr. *Hall*, contra, on the part of the defendant, insisted, that such a kind of investigation would be attended with great delay, as well as expense and trouble, contrary to the spirit and design of the act; which was to

Fabre v. Zylstra.

give speedy and effectual relief to unfortunate debtors, who were willing to give up their all to their creditors, in order to be relieved from confinement; that the defendant had been confined within prison walls for some time, and to detain him any longer, would not be affording him the privilege allowed to persons in his unfortunate situation. Besides, they said, the first clause of the act contemplated a summary way of examining into the matter contained in an insolvent debtor's petition, by the judges, who were authorized to discharge the insolvent debtor, if they were satisfied of the truth of his petition, without detaining him for the slow process of a jury trial, which the act did not contemplate. They further observed, that all that had been alleged against the defendant was mere surmise and allegation, unsupported by any affidavits, or other document to establish such fraud.

WATIES and BAY, present, said it was the duty of the court to give as speedy relief to insolvent debtors applying for the benefit of this act, as the nature of the thing and the principles of the law itself would warrant. But there were cases which often called upon the justice of the court to be cautious and circumspect in the exercise of the powers given to the judges by this act. In particular, they are to be satisfied that the person applying for the benefit of the act is about acting the fair and honest part with his creditors; and that he has not concealed, transferred, or conveyed away any part of his property, with a view of defrauding them out of any part of their just debts. In order to come at this satisfaction, they observed, there were two modes of proceeding, which might be resorted to for that purpose. The first was, by examining into the case themselves, in a summary manner, without the intervention of a jury. The second was, by sending the case to the jury, to determine on matters of fraud, which were very proper for their consideration. That in common cases, where the facts and circumstances were easily come at and obtained, the judges

would proceed agreeable to the first mode, and examine into the matters themselves; but in intricate and perplexed or complicated cases, they would send it to a jury to determine, on a suggestion to be filed for that purpose, in which they would allow the defendant the liberty of pleading, and defending himself, in like manner as on the trial of issues; and admit or refuse the party the benefit of the act, according to such finding. They were aware, they said, there were no express words authorizing them to send a case to a jury in the insolvent debtors' act; but, reasoning from analogy and principle, they thought themselves warranted in doing so, as it was the best possible mode of sifting out the truth, and coming at the justice of the case. It was analogous to the power given to the judges, by the prison-bounds act, in similar cases, where fraud is alleged; and it is conformable to the practice in equity, in sending down causes to be tried at law, in order *to satisfy the conscience of the chancellor*, in difficult and doubtful cases.

They were further of opinion, however, that no case of this kind ought to be delayed or sent down to a jury, on bare suggestions or allegations of fraud. Affidavits ought, in all cases to be produced, to warrant the court in sending it to a jury, on a suggestion of fraud.

The plaintiff's counsel then moved for another day, in order that they might prepare and bring forward the affidavits; which was opposed by the opposite party; but, *the Court* said, as the practice in these cases had not been settled by any express adjudication, they would give that indulgence in this case, which they said should not be drawn into a precedent in future, as the court would always expect, in every application of this kind, that the affidavits would be produced at the time of the motion.

On the following day, sundry affidavits were produced and read, stating strong grounds of fraud on the part of the defendant. Whereupon the court ordered him to be re-

Fabre v. Zylstra.

manded to gaol, and the suggestion to be filed *instanter*, to the end that the matters of fraud set forth in the affidavits, which were to form the substratum of the suggestion, might be tried in term time, with as little delay as possible.

N. B. The merits of this case were afterwards tried in a suit brought by *Baugniett* against the sheriff of *Charleston* district, who had seized the goods in question under another execution and sold them; in which suit the fraudulent conveyances, or bills of sale, from *Zylstra* to *Baugniett* were very fully and clearly established.

This case was afterwards submitted by WATIES and BAY to the other judges, who fully concurred with them in the principles laid down in it, and it has served as a precedent, in all cases of a similar nature, since.

Charleston District, 1798.

THE STATE *against* JOSEPH QUARREL.

If an alien is drawn and impanelled as a juror, it is a good cause of challenge before trial; but if permitted to be sworn by the prisoner, it is too late, after trial and conviction, to make it a ground for a new trial.

MURDER. Motion for new trial.

The prisoner had been convicted, on very clear testimony, in the court of general sessions of the peace, &c. of the murder of one ————, by stabbing with a shoemaker's knife; and a motion was now made for a new trial, on the ground that *John Love*, who sat on the petit jury who tried him, was an alien *Englishman*. Mr. *Love* had lived many years in *Charleston*, and was a tradesman in repute, who had paid his taxes, and done militia duty regularly as a citizen; but it appeared he had never taken the oaths of allegiance and fidelity to the *United States*, but neither the prisoner nor his counsel knew of it at the time of his trial. On behalf of the prisoner it was urged, that what was good cause of challenge before trial, was good cause for a motion in arrest of judg-

ment, or for a new trial, afterwards. That *Love* being a foreigner, was a very good ground of challenge, had the prisoner known of it; but being ignorant of that circumstance, he permitted him to be sworn as a juryman.

The common law requires that twelve men at least shall find a bill against a man, and twelve more must find him guilty, before his life can be put in jeopardy. These jurors should be *omni exceptione majores;* not liable to objection either *propter honoris respectum*, *propter defectum*, *propter affectum*, or *propter delictum*. They should be *liberos et legales*, *et legales homines de vicineto*.

In the present case, however, it was said, there were not twelve good and lawful men who passed on his trial, only eleven; so that this was not a conviction according to the common law of the land.

The *Attorney-General*, in reply. This is rather an objection of a formal, than of a substantial nature. That new trials were very often discretionary in the court, and unless they were convinced that justice had not been done, they would not grant a new trial. That the present objection was in nature of a challenge to a juror, which might have been good before trial, but now too late after trial. That it is laid down in a great number of cases, that a juror cannot be challenged after he is sworn, unless it be for some cause after he is sworn. 2 *Hawk.* 412. 4 *Black.* 346. That this point had been determined in a case tried at *Georgetown*, and afterwards taken up to the court of appeals at *Columbia*, where an alien sat upon the trial, which was unknown to the defendant at the time of trial. This was made the ground of a motion for a new trial; but the judges, after argument, refused it, as it was too late after trial to take exception to a juror, which might have been excepted to at the time of trial. That it was almost impossible for the sheriff of any district, unless he was to turn inquisitor, to tell the difference between an *English* alien and a citizen; the manners, language and cast of features were the same. Aliens are obli-

State v. Quarrel.

ged to serve in the militia after a residence of six months, and they pay taxes, and all the jury lists in the state are made out from the returns of the tax-collectors. No blame or censure, therefore, could attach to the officers of the court, for returning an alien on a panel, as they were put into and drawn out of a jury box in the same manner as citizens, the law having made no provision to distinguish them. And indeed there does not exist the same reason for challenging them, as there does for challenging other foreigners, for the laws of both countries are exactly the same, so that the objection is more in name and in idea than in reason or justice. And for the same reason it is clear law, that if an alien is to be tried, and a common jury is summoned, and he does not object before trial, he shall not be allowed it afterwards. 2 *Hawk.* 420. But if he allege that he is an alien, a *venire de medietate linguæ* shall issue. That by the 43d clause of the jury law, passed in 1731, every prisoner in this state is entitled to a copy of the indictment found against him, with a copy of the panel of the jury, three full days before the trial, that he may know the jurors who are to pass upon his trial, as well as the names of those who found the bill against him. This privilege is allowed *in favorum vitæ*, and in order that every prisoner, whose life is in jeopardy, may have a fair opportunity of taking every exception which the law allows in his favour. And if he will not avail himself of these privileges and advantages before trial, it is his own fault; he cannot do so afterwards. It would, indeed, be trifling with the justice of the country, if, after all the solemnities of law, and trouble of examining witnesses, and the pains taken to come at the substantial justice of the case, such an exception as the present one was allowed to set afloat all the proceedings attending the prisoner's conviction.

Pub. Laws, p. 150.

The Judges, after hearing the arguments, did not think themselves justifiable in ordering a new trial, as it was too late after verdict. That the prisoner was reminded of this

State v. Quarrel.

right of objection to every juryman, by the clerk, as he was called up to be sworn; and after objecting to a number, he permitted Mr. *Love* to be sworn, so that he may be said to have been a juror of his own choice. Besides, he had a right to a copy of his indictment, and the panel of the jury, three whole days before his trial; one of the ends and designs of this indulgence was, that a prisoner might inquire into the character and qualifications of every juror who might pass upon his trial, and if he did not do so, it was his own fault. The court will not now permit him to take advantage of his own negligence.

Motion for new trial overruled, and rule discharged.

The presiding judge then passed sentence of death on the prisoner, but he was afterwards pardoned by the governor.

Present, BURKE, GRIMKE, WATIES and BAY.

Charleston District, 1798.

THE STATE *against* MATTHEW O'DRISCOLL. } MISDEMEANOR in sending a challenge to Colonel *Fishburn*.

THE STATE *against* The Same. } MISDEMEANOR for a libel in posting him for not accepting of the challenge.

Where a grand juror, who finds a bill of indictment at one court, is drawn to serve as a petit juror at the next succeeding court, and defendant will not challenge or except to him before he is sworn on a trial, it is too late to move for a new trial on that account, after a trial and conviction on the same.

Motion for a new trial in each of the above cases.

The defendant had been convicted on both of the above indictments, at the instance of the prosecutor, who did not

State v. O'Driscoll.

conceive himself in honour bound to accept of the challenge, for reasons which were very satisfactory to the court and jury, before whom the cases were tried.

The ground of the motion in both cases was, that a Mr. *Knight*, who had been drawn as a talesman, and who had taken his seat as a juryman on the trial, had at a former court served as a grand juryman, and was one who found the bill against the defendant.

In support of these motions, the same grounds were taken which had been urged in *Quarrel's* case, that on every criminal trial and conviction, there should be twenty-four good and lawful men; twelve at least to find the bill, and twelve more to try the case; but that there were only eleven good and lawful men sworn upon the trial of these misdemeanors, which convictions were not agreeable to the rules of the common law, inasmuch as a juror who found the bill was incompetent to sit and try the issue; for, it was urged, that if any one of the twelve who found the bill might sit upon the trial, the whole twelve might; and so it might happen, that a man might be held to answer in a criminal court of justice in the first instance, and tried by the same men afterwards, which would be inconsistent with the common law principles of criminal justice, as a man in that case would be tried by his accusers, it being a well known maxim that the finding of the grand jury amounts to no more in law than to a legal accusation.

To this it was replied, that the decision in *Quarrel's* case was an answer to the objections in the present cases, because the defendant here had a good cause of challenge in his hand, and after reading the names of the grand jurors in the bill of indictment, if he did not make the objection, it was his own fault; it was too late after trial and conviction. It was compared to a motion for a new trial, on the ground of discovering evidence after a trial, which, by due diligence might have been produced at the trial; in which case it

was urged the court never would grant a new trial, or suffer a man to take advantage of his own negligence, or make that a ground for another trial.

The State v. O'Driscoll.

The Court was against the new trials in these cases. They said the principles laid down in the *Georgetown* case, and *Quarrel's*, had settled these; there was no substantial difference between them. In the two former cases, the jurors were aliens; which formed a good cause of challenge in each case; but as the challenges were not made before trial, they held it too late afterwards. So in the present case, the sitting on the grand jury which found the bill was a good ground of challenge in these cases; but as the defendant sat by, with the indictment before him, and suffered the cases to proceed, and go to the jury without making any objection to Mr. *Knight*, when the law put it in his power and afforded him the opportunity, it is too late for him now to take advantage of it. They admitted, that the rules of common law were not lightly to be overlooked, but that diligence was the life of the law, *vigilanti, non dormienti, jura subveniunt*; and when a man himself waived a privilege which he could not take advantage of, it was not for the courts of justice to aid such negligence, by giving him another opportunity of availing himself of it.

The rules for new trials were discharged. The court then proceeded to sentence the defendant to two months' imprisonment, and to pay a fine of 50*l.* sterling, and to give security for his good behaviour, and particularly towards the prosecutor, for the space of two years.

Present, BURKE, GRIMKE, WATIES and BAY.

Charleston District, 1798.

ALEXANDER CHOLETT *against* JOHN HART, Sheriff of *Charleston* District.

Four years' peaceable possession of negroes or other chattels, under a *bona fide* sale for valuable consideration, gives the *possessor a good title* against a sheriff who may attempt to levy on them, as the property of a former proprietor, &c. under the pretence that they were bound by a former execution in his office.

Trespass will lay against a sheriff who seizes negroes as the property of a third person, after they have been 4 years in the possession of a *bona fide* purchaser.

TRESPASS, for taking and carrying away sundry negroes, out of plaintiff's possession, for the debt of a third person.

Defendant justified under an execution (a *fi. fa.*) delivered to him, in the suit of the *Executors of Benjamin Smith* v. *Richard Ellis*.

On the trial of this cause, it appeared from the report of the presiding judge, that a judgment had been obtained by the executors of *Benjamin Smith*, against *Richard Ellis*, and an execution lodged in the sheriff's office, on the 27th of *August*, 1785. That this judgment remained over unsatisfied till the year 1797, more than eleven years, when it was renewed by a *sci. fa.* and a new execution lodged in the present sheriff's office, against the defendant in that action. It was under this last execution, that the defendant, as sheriff of *Charleston* district, seized the negroes in question, as the property of *Ellis*; which it was contended had been bound by the first execution lodged in 1785.

The plaintiff, Mr. *Cholett*, on his part, produced a bill of sale of the negroes in question, and sundry others from *Richard Ellis*, to him, dated the 9th of *October*, 1786, for a valuable consideration mentioned in the said bill of sale; and which was *bona fide* paid, at the time of the purchase; alleging at the same time, that he knew nothing of the judgment or execution against *Ellis*, when he made a bargain with him for the negroes. Upon this bill of sale, and his *possession of the said negroes*, till they were taken by the sheriff, he rested his claim and title to them.

The *Attorney-General*, and Mr. *Marshall*, on behalf of the sheriff, contended, that the lodging of the first execution in the sheriff's office, bound the property of *Ellis*, and

gave a lien on the negroes in dispute, by the statute of frauds, from the day it was lodged, which no sale afterwards by the defendant could defeat. That the statute of limitations could not be pleaded against a record, nor have any operation against a judgment and an execution. 1 *Esp.* 200. That this lien created by the statute, was in fact a *statutory mortgage;* which no subsequent judgment, or voluntary conveyance from that time, could defeat or impugn. By the common law, the *fieri facias* bound the defendant's goods from the *teste* of the writ, *so that any sale afterwards was void;* because the goods from the time of the *teste*, *were attendant* to answer the execution: but men abused the notion of this retrospect of the goods being bound by the *teste* of the writ, to make sales uncertain; for they took out writs one after the other, without delivering them to the sheriff, by which they bound the goods of their debtors in such a manner, as made all commerce uncertain; to prevent which, the statute of frauds bound the goods only, from the *delivery of the writs to the sheriff*. *Gilb. Law of Executions*, 14. This statute made no alteration as to the binding efficacy of the *fieri facias*, only fixed with precise certainty the time when it was to commence, instead of leaving it to a retrospective reference, to the *teste* of the execution. So highly does the law estimate this binding quality of the *fi. fa.* that if a voluntary sale for valuable consideration is made on the same day, that the writ was formerly tested, or (since the statute) lodged with the sheriff, the execution shall take place, or have a preference. *Cro. Eliz.* 440. *Gilb. Law of Executions*, 15.

They next contended, that if the first writ of execution bound *Ellis's* property, from the time of the delivery to the sheriff, it still remained bound; or to make use of the common law language, it continued to be *attendant on that execution*, until satisfaction was made; and the second execution, after the judgment was revived by a *sci. fa.* was only the *mandate* to the sheriff then in office, to complete the satisfaction which had been commenced by the former

Cholett v. Hart.

execution in the hands of a former sheriff. Under these circumstances, they said, the present sheriff, *Hart*, was obliged to pursue the property so bound, wherever he could find it; and consequently, could not be said to be guilty of any trespass.

Mr. *Ford*, for the plaintiff, did not mean to contend that the judgment or execution of the executor of *Smith* against *Ellis*, was barred by the statute of limitations; but insisted, that a *bona fide purchaser*, for a valuable consideration, of negroes *never levied on*, and four years' *peaceable enjoyment afterwards*, protected the innocent purchaser, under the act of limitations, *against all the world*. That the clause of the limitation act expressly declared, "that all "actions of *trespass*, detinue, trover and replevin, actions "on the case, and account, covenant, and *quare clausum* "*fregit*, should be commenced within four years, next after "the cause of action accrued, and not after." Now admitting for argument sake, that the sheriff could have brought his action, without any levy specifically made on these negroes, it should have been brought within four years after the plaintiff, Mr. *Cholett*, took them away out of the possession of Mr. *Ellis*, which was on the 9th of *October*, 1786, the date of the bill of sale. It was evident therefore, according to this construction, that any action for the recovery of them, or damages in taking them away, should have been commenced on or before the 9th of *October*, 1790; instead of which all the parties slept upon their rights till the year 1797, full seven years after their right of action was gone. But he contended, that the former sheriff, on the lodging of the first execution, had no right to maintain any action against a third person for the specific negroes in question, until there was an actual levy by virtue of such execution. He admitted, that by the common law, the execution bound the defendant's property; but this was to be taken *sub modo;* that is, it bound *every part of it*, in such a manner, that the sheriff could seize and take *any*

Cholett v. Hart.

part of it that he could find, or reduce into his possession: then it was, and not before, that the sheriff on seizure acquired such a property in the goods, that he could maintain trespass or trover for them; for by the seizure, he had the goods to sell, that he might have the money in court; and therefore when he seized the goods, he had the property in them for that purpose. Now it was very evident, he said, the sheriff could maintain no action for goods before they were seized and reduced into possession; consequently, as the former sheriff had never made this levy or seizure, no right of action ever accrued to him during the time he was in office; though he might have made the levy, if he had thought proper; besides it was urged, that some reasonable bounds ought to be set to this binding quality of an execution; there ought to be some limits and boundaries placed around it; for instance a man owed 100*l.* sterling, and he possessed one hundred negroes, any one of which was sufficient to pay the debt; an execution is lodged in the sheriff's office against the defendant, but no levy made on any one particular negro. Is the defendant then to be debarred of the privilege of selling afterwards, if he pleases, ninety-nine of his negroes? and has this judgment creditor a right to pursue any one of these ninety-nine negroes, at any future day, in the hands of an innocent purchaser, in order to pay off this dormant debt, if defendant should in process of time turn out to be insolvent? This, he said, was unreasonable and unjust; he therefore put this case, to shew the wisdom and sound policy of the limitation act, which had fixed these limits and boundaries, and which had declared that no action should be maintained for any such property, unless commenced within four years after the right accrued.

2 *Saund.* 47. *Lev.* 282. *Gilb. Law of Executions,* 15.

The case then went under the charge of the judge to the jury, who told them that the act of limitation protected the property in the possession of the plaintiff, against the seizure of the sheriff under the second execution, after four years'

Cholett v. Hart.

peaceable possession; and consequently, that the sheriff ought to be considered as a trespasser. The jury then found for the plaintiff a sum sufficiently large to oblige the sheriff to give up the negroes; this being an amicable suit merely to try the right of the sheriff to make the seizure.

A motion was afterwards made for a new trial, on the ground of misdirection in point of law, on the part of the judge, and as a verdict against law.

The motion was very fully argued, by counsel on both sides, when nearly the same grounds were taken that had been urged on the trial; after which, the judgment of the court was delivered by Mr. Justice WATIES, as follows;

That the great object of the limitation act which was passed so long ago as the year 1712, and which had remained in force to the present day, with scarcely a single alteration, was to quiet the inhabitants of this state, in the peaceable and quiet enjoyment of their estates, both *real* and personal. This was deemed by our ancestors, a matter of primary consideration, tending to give security and permanency to property of all kinds; and to prevent as much as possible, every species of litigation so injurious to society, and especially in a young country, just then emerging from the difficulties attending the first settlement of it. The second and third clauses of the act, were intended to secure actual settlers in the possession of their lands, and hundreds of suits have been determined in this country, in favour of possessory rights alone, against the clearest titles by grants and deeds, &c.

The fifth and sixth clauses of the act, were intended to give the like security to personal property of every kind, in the actual possession of our citizens, in the same manner as was afforded to the possessors of landed property. *Five years'* possession completed the *title to lands*, and *four years'*

possession the title to *all kinds of chattels*, as no suit can be maintained for either, without being commenced within the above periods.

Whatever advantages the common law meant to give to judgments, executions, and the levies of sheriffs, they are all circumscribed by the limits prescribed by this act, as to *bona fide* purchasers and possessors. But no common law right is affected by it, if pursued within the above periods, which the policy of the law considers as a reasonable time to pursue those rights; *leges vigilantibus non dormientibus subveniunt;* and if men will sleep upon their rights, it is their own faults; they have themselves to blame, and must take the consequences.

There can be no doubt, but the sheriff might have levied on the negroes when the first execution was lodged; and if he had done so, he might have pursued his action of trover or trespass, against any person into whose hands they might come, at any time within four years after the day of the levy; but as he did not do either within that time, his right under that execution was gone. Upon the renewal of the judgment, eleven years after, and the lodging of the second execution in the sheriff's office, the present sheriff might still have levied on the negroes, if they had remained in the possession of *Ellis*, the defendant in the action, [illegible] would have run against the judgment or execution, as against him; the property would still have been bound by the renewal of the execution. But the property of the negroes in question, was not in him when the second execution was renewed; that had been transferred to the plaintiff *Cholett*, and he had enjoyed the peaceable possession of them more than four years after the time of their delivery: his title, therefore, was complete at the end of that period, since which time he has had the peaceable enjoyment of them six years more, before the sheriff took possession of them.

Cholett v. Hart

It is clear, therefore, that the sheriff was not justifiable in seizing them, and taking them off, under this second execution. He is undoubtedly a trespasser.

Rule for a new trial discharged.

Present, BURKE, GRIMKE, WATIES and BAY.

Charleston District, 1798.

ARCHIBALD NEWBIGGIN *against* PILLANS and WIFE.

Where a *feme covert* keeps a shop, and carries on trade herself, without her husband's intermeddling, for a number of years, it will constitute her a *feme sole dealer*, and she shall be liable for her own contract.

ASSUMPSIT for goods sold and delivered to the wife, a sole dealer.

In this case it appeared, that Mrs. *Pillans* had for many years acted as a sole dealer, with the knowledge and approbation of her husband, who was a schoolmaster; that she had been in the uniform practice of keeping a shop, and selling out goods, keeping books, and rendering accounts in her own name only: and in short, of carrying on all [illegible] merchandise in her way solely, without ever naming her husband in any of her mercantile transactions. So extensive were her concerns, that she had for several years imported goods in her own name, paid duties at the custom-house, and received shipments and consignments, in the way of trade in every respect, as if she had been a *feme sole*; and had kept up a sign at her door in her own name, for that purpose. This action, therefore, was for the amount of a shipment of goods, for her account, from *Glasgow*, in which her husband's name was mentioned for conformity sake only. The declaration contained three counts, one against *Pillans and Wife*, another against her as a sole trader, and a third against her, for money had and received to the plaintiff's use; to which there was a plea of coverture

put in, to wit, that she was not liable for any contracts in her own right during such coverture.

It came out further in evidence, that she had been very successful in trade, and had made a great deal of money; while, on the other hand, her husband had been barely able to support himself by his school, and had made nothing; so that a verdict against him would have been of no use to her creditors, as he had nothing to pay them with. It was admitted, that the goods in question had come into her hands, and that she had received the money for them.

Mr. *Marshall*, for defendant, contended, that this action would not lay against a *feme covert* by the general law of the land, as she was incapable of making any contract during coverture; therefore, he said, it was impossible for the plaintiff to recover against her, under the first count in the declaration. He admitted, that under the act of assembly, a husband might by a special deed under his hand and seal, by and with the consent of his wife, constitute her a sole trader; and that her contracts would then bind her, and she might sue and be sued as such, naming her husband for conformity sake: but, he said, Mr *Pillans* never had executed any such deed to his wife; therefore, he argued, the plaintiff could not recover under the second count in the declaration. And lastly, he urged, that the plaintiff could not recover under the third and last count in the declaration, because the law would presume, that whatever money she received, was to the use of her husband, and not to the use of a third person, with whom she could make no contract.

Mr. *Turnbull*, for the plaintiff, in reply, gave up the first count in his declaration, but relied on the others. He contended, that a *feme sole* dealer might be constituted two ways; one by deed under the hand and seal of the husband, pursuant to the directions of the act of the legislature, in that case provided; the other, by custom and usage; "as "where a *feme* trades by herself in one trade, with which

Newbiggin v. Pillans and Wife.

"her husband doth not intermeddle; and buys and sells in "that trade, there the *feme* shall be sued, and the husband "named only for conformity; and if judgment be given "against him, execution shall be *only against the feme.*" *Cro. Car.* 69. *Show.* 184. *Skin.* 67.

That the act of the legislature did not alter or take away the common law, in regard to this custom and usage; it only came in aid of the common law, and enabled the husband to do at once, by his own act, what would require years to accomplish by the common law, in order to establish a usage or custom; that commerce was highly favoured in law, and whatever tended to give it facility and credit, was well deserving the attention and protection of our courts of justice. In the present case, he said, the parties all came under the strict rules of commercial law. Mrs. *Pillans* and her husband were of different trades; he a schoolmaster or public teacher, in which she never interfered; she a shop-keeper, engaged in buying and selling goods, in which he never intermeddled. That she had carried on the trade in her own name, so long as not only to have got great credit at home in this country, but had extended it with merchants in a foreign country; who made no difficulty in shipping and consigning goods to her address; so that she fully answered the description of a *feme sole* dealer, according to usage and custom. Admitting, however, he said, that any doubt could arise on the head of this usage or custom under the second count, which he insisted could not be the case; still, he said, the plaintiff ought to recover on the third and last count in the declaration, because the plaintiff's goods had gone into her hands, and she had received the money for them; therefore, *ex æquo et bono*, she ought not to retain the money from him. No part of the money had gone into the hands of the husband; that was not even pretended. The goods had gone into her store, out of which she had retailed goods for many years, and among others the goods which had been shipped her by the plaintiff. He further said, that to

suffer her at this day, to screen herself from responsibility, under the plea of coverture, when it was notoriously known that the husband was not worth a shilling, would in fact be enabling her to swindle the plaintiff out of the amount of the goods shipped to her.

Newbiggin v. Pillans and Wife.

The presiding judge, BAY, told the jury, that he thought the custom a reasonable one, and ought to be supported in this city, as well as in the city of *London;* it was allowed there, in favour of commerce, and for the better support of families, and he saw no good reason why it should not be extended to this country, for the same strong and cogent reasons. Our laws certainly legalized this kind of trade, by *feme sole* dealers, and an act of the legislature had passed, for the better and more speedily enabling them to carry on this commerce, and they were highly protected in those rights; but this act did not appear to him to have altered the common law, with respect to usage or custom in particular cities and places where it had been established; it only enabled a man to do at once, in one case, that which it would require years to establish in the other case.

If, however, he said, the jury should have any doubts about the reasonableness and propriety of this custom, which had been urged in support of the second count in the declaration, there could be none under the third and last count for money had and received; as the goods had been sold by her in the course of trade, and the money had come into her hands, she ought not in justice and good conscience, to retain it from the plaintiff.

The jury, without retiring, found a verdict against the defendants, for the amount of the plaintiff's demand. A motion was made for a new trial, on the ground of misdirection, and as a verdict against law; when, after argument, it was overruled, and the rule discharged, on the ground that the action was clearly maintainable on the two last counts in the declaration.

Present, BURKE, GRIMKE and BAY.

Charleston District, 1798.

THOMAS FRINK, & Co. *ads.* WILLIAM LUYTEN, Administrator of HUNT, deceased.

Where executors and administrators sue in right of their testators or intestates, and are nonsuited or fail in their suits, they are *not liable for costs.*

But where they are defendants, *they are liable*, and judgment shall be *de bonis testatoris.*

If an executor sue for a trespass or conversion *after the death of the testator*, where he need not *name himself executor*, or for a cause of action of which he *is conusant*, in such cases, he shall be liable if he fail in his action, or become nonsuit.

1 *Bac. Abr.* 918.

MOTION to set aside a judgment, and *ca. sa.* against an administrator, for costs.

The defendants in this case, were sued by the administrator of *Hunt*, for the balance of an account which was apparently due to the estate; but owing to a discount which was brought in against this demand, the plaintiff did not think proper to proceed in the action, and suffered a nonsuit.

The defendants' attorney entered up a judgment on this suit, against the administrator of *Hunt*, *de bonis propriis*, and took a *ca. sa* against him, on which he was taken; this, therefore, was a motion to set aside the judgment as irregular, and to have *Luyten* discharged from the custody of the sheriff on the *ca sa.*

Mr. *Fraser*, in support of the motion, laid it down as a general rule of law, that executors and administrators where they are plaintiffs, pay no costs; because they come *in autre droit*, and not in their own right; besides, they are bound by *oath* to recover the rights and credits of the testator or intestate, it would therefore be most unreasonable and unjust, to make them liable for costs. Another objection in the present case, he said, was, that the suit was in the name of the administrator in right of the intestate, and upon this record he had entered a judgment against him *de bonis propriis*, which was a repugnancy, the judgment not being consistent with the record.

Mr. *Bailey*, for defendants, relied on 3 *Burr.* 1451. where it is said, an executor shall not have leave to discontinue, unless on payment of costs, where he knowingly

brings a wrong action. Also on 3 *Burr.* 1584. where it is said an executor shall not pay costs on a *non pros.* but he shall if he does not go on to trial agreeable to notice. Frink & Co. ads. Luyten.

The Court was of opinion, that the judgment *de bonis propriis* in this case was irregular, and that the administrator should be discharged from the *ca. sa.* with costs. They laid it down, that an executor defendant pays costs in all cases, and the judgment is *de bonis testatoris;* so where there is judgment for him in cases where he is defendant, he shall have costs. 1 *Bac.* 517. *Bro. Executor,* 164. *Plowd.* 183. So likewise in equity, costs are usually awarded out of assets. *Eq. Cas. Abr.* 125. But an executor or administrator is not within the meaning of the statutes, which give costs to a defendant after verdict or nonsuit, when they are plaintiffs; in all those cases, where they are plaintiffs, they pay no costs, because (as has been said before) they are *in autre droit,* and are but trustees for creditors, and are not presumed to be *sufficiently conusant* of the personal contracts of those they represent. Whenever, therefore, there is an *apparent right,* it is their duty, and they are bound to pursue it, though it turn out eventually that there is a good defence against the action; as in the present case, it turned out that there was a good discount, which the administrator might have known nothing about. If, however, an executor or administrator bring an action *in their own right,* as for a *conversion* or *trespass* in their *own time,* of which they are *conusant,* they shall pay costs; or if they bring *assumpsit* for money received *after the death of the testator,* and become nonsuit, they shall pay costs; for the law gives this privilege to executors, of not paying costs, only where the cause of action accrued in the testator's lifetime, and there only, because they are not supposed to be *conusant* or *privy* to the acts of the testator.

31 *H.* VI. 13. 4 *Jac.* 1. c. 3. 8 and 9 *W.* & *M.* c. 11.

1 *Bac. Abr.* 518.

11 *Mod.* 135.

So also in cases where an executor brings an action where he need not *name himself executor,* and it goes against him, he must pay costs.

11 *Mod.* 174.

Frink & Co. ads. Luyten.

The goods of the testator are assets in the hands of an executor; he has a qualified property in them; he is not obliged to name himself executor in an action of trespass or trover for them, if the trespass or conversion is since the testator's death; therefore it is, in case of nonsuit, that he is liable for costs. So also, if an executor will not go on to trial, agreeable to notice, the defendant shall not be needlessly harassed; he shall pay costs in such cases. *Salk.* 314. *Mod. Cas.* 93. These, the court observed, were in general the cases where executors and administrators are exempt or liable for costs; but there might be other cases, either of liability or exemption, which depend upon peculiar circumstances, not taken notice of above, as in the case quoted by defendants' counsel from 3 *Burr.* 1451. which was a case where the executor brought an action to harass the defendant, *knowing it to be a wrong action;* there he was made liable for costs. But in the case under consideration, they saw nothing oppressive in it, or which took it out of the general rule of law, in exempting executors and administrators from costs, who endeavour to recover the *bona fide* debts and rights of their testators or intestates.

Salk. 314.

3 *Burr.* 1584.

Rule made absolute for setting aside the judgment, and discharging the administrator from the arrest, with costs.

Present, BURKE, GRIMKE and BAY.

Sundry Creditors of Messrs. THAYER & STURGIS *against* The SHERIFF OF CHARLESTON DISTRICT.

Charleston District, 1798.

UPON a rule on the sheriff to bring money into court, to be paid over to the plaintiffs, on their executions, &c.

At sheriffs' sales, *caveat emptor* is a good rule. *The claim of defendant's wife's dower*, is no good reason why the purchaser should not pay the money bid for a house and lot at sheriff's sale.

The cause shewn by the sheriff in this case was, that he had sold a house and lot on *East Bay-street*, the property of the defendants *Thayer* and *Sturgis*, which had been bought in by *John Duncan*, at and for the sum of 1,800*l.* sterling, but that he had refused to pay the purchase-money unless he had an abatement of 400*l.* sterling, for the dower which the wives of the defendants might claim, in case of their surviving their husbands; and therefore prayed the aid and advice of the court, before he made his return, or proceeded to resell the house and lot, at the risk of the purchaser.

On the part of the creditors it was urged, that this dower, which was made the pretext of non-payment of the money by the purchaser, was a mere possibility, which depended upon a contingency which might or might not happen. That it was very uncertain whether these ladies would survive their husbands or not; and that even if they did, it might be at a very late period of their lives, when their right of dower would be worth very little, if any thing. That, at all events, there was no rule at the common law for ascertaining uncertain and contingent damages; and the dower act only related to widows who had lost their husbands, and whose rights had actually accrued, and which did not depend on possibilities. It was further urged, that this was a case of considerable importance to the public, and merited the serious consideration of the court.

This sale was made by operation of law, in *consequence* of a judgment obtained in a court of justice, in which the plaintiffs in the different suits were not bound to warrant or in-

Creditors of Thayer and Sturgis v. Sheriff of Charleston.

demnify the purchaser against any such claims; it differed widely from private sales, where the seller was bound to warrant and defend the property free from all incumbrances, or where the payment of the consideration money raised an implied covenant in law. That the right of property of the defendants in the action was the thing seized and sold by the sheriff, more or less; whatever that might be, the purchaser had a right to by virtue of this sale, and the sheriff could convey no more. It was the duty of the purchaser to examine into the nature of the estate, and the quality of the thing sold, before he made his purchase. *Caveat emptor* was the *proper rule* in such a case, and unless that was laid down as the true rule in sheriffs' sales, it would render them uncertain in all parts of the country, and constant shifts and pretences would be conjured up, by purchasers, in all cases where after purchase they did not like their bargains, more especially where the wives of defendants were living at the time of such sale.

On the part of the purchaser, who did not wish to give up his bargain, it was said, a case had been determined in this court in 1793, (*Blake's* case,) where a contingent claim of dower had been sent to a jury, to determine what deduction out of the purchase-money ought to be made for her possible claim, which the jury allowed, and which, it was urged, ought to make a precedent in every case. That although the purchaser had demanded an abatement of 400*l.* in this case out of the purchase-money, yet he was willing to submit it to a jury, as in Mrs. *Blake's* case, to ascertain a reasonable deduction in this case.

Per Curiam. There is no rule at law for ascertaining possible damages; the principle is absolutely unknown in the history of our jurisprudence. A court of equity will in some cases, where a subsequent right is certain or probable, order indemnity to be given, and make that a condition of their decretal orders; but a court of law possesses no such

power. In a case, however, like the present, they thought that it would be clogging public sales, made by operation of law, exceedingly, to lay down any such rule, even if the common law would admit of it. These sales are made by operation of law, in which the will and consent of the defendants are never consulted. They are forced upon them, whether they assent or dissent to or from them, and it is their right, whatever that may be, more or less, that is sold by the sheriff, who is a public officer of justice. There is no warranty in law, either express or implied, raised on any of the parties concerned in such a sale; neither on the part of the former owner, the defendant, nor the sheriff, who is the mere organ of the law for transferring the right of the defendant. *Caveat emptor*, under those circumstances, is the best possible rule that can be laid down or adopted. Every man who goes to a sheriff's sale, ought to take care and examine into the title of the defendant carefully before he attempts to bid; and that is one reason, among many, why property is in general sold so much under its real value at these sales. The case of Mrs. *Blake*, relied upon, had no bearing on or analogy to the present one; *that* was an action brought on a special agreement, for the consideration money of a tract or lot of land sold at private sale, in which case legal conveyances were tendered, and the claim of dower went by consent of parties to the jury, to be deducted at once from the consideration money. It was a kind of compromise between the parties, and not fixed by any rule of law; therefore, can never be urged as a precedent, in a case like the one now under consideration of the court.

The rule was, therefore, made absolute on the sheriff, to bring the money into court, or to resell without delay, at the risk of the purchaser.

Present, BURKE, GRIMKE and BAY.

Charleston District, 1798.

JOHN SLADE *against* ISAAC TEASDALE.

Tradesmen's books good evidence to prove work and labour, as a carpenter, to a jury, under a fair construction of the act of the legislature, allowing merchants' books to be given in evidence to prove book accounts.

ASSUMPSIT on a book account, for carpenter's work.

In support of the action to the jury, the plaintiff offered his book of original entries, to prove his account for work and labour as a carpenter. An exception was taken to this book being given in evidence, on the ground that the act allowing merchants' books to be given in evidence, to prove their open accounts, was a deviation from the rules of the common law, and, as such, should be construed strictly, and confined to merchants only, and not extended by construction to any other class of men. But this was overruled by the presiding judge, who permitted the book to go to the jury as evidence of the work and labour, and they found for the plaintiff the amount of his account.

A motion was afterwards made for a new trial, on the same ground. But it was resolved by all the judges present, that as it had long been the practice of this court, even before the revolution, to permit tradesmen's books under a fair construction of the act, to go to the jury, the judge who tried the cause acted regularly, in permitting the books in the present case, to be sent to them as evidence of the plaintiff's demand. They said, it had long been established as a rule, that all classes of men, who were obliged to keep books in the way of their trade, should be put upon the same footing. They saw no good reason, why a merchant should be peculiarly privileged, and tradesmen excluded from the like benefit. The construction given, appeared to them to be a reasonable one; at all events it had been so long in use as a rule of evidence in our courts in this country, that they did not think themselves at liberty to depart from it.

The same point was determined in the case of *Lamb* v. *Hart*, at *Columbia*, in 1802. All the judges present.

The rule for a new trial was therefore discharged.

Present, BURKE, GRIMKE and BAY.

Slade v. Teasdale.

N. B. Since the determination of the above cases in favour of tradesmen's books, the rule has been circumscribed as to other classes of men. In *Charleston*, in 1807, in the case of *Watson* v. *Bigelow*, a scrivener's book was determined not to be good evidence for services performed in that line, and for commissions, &c. Also in the case of *Geter* v. *Martin*, at *Columbia*, in *May*, 1807, it was determined that a planter's book was not within the act.

BAY and TREZEVANT, contra.

See these cases in their order. Post.

ISAAC TEASDALE *against* JOHN HART, Sheriff of *Charleston* District.

Charleston District, 1798.

SPECIAL action on the case, for taking insufficient bail, *per quod*, plaintiff lost his debt.

Where a sheriff's deputy takes insufficient bail, or is in anywise concerned in tampering with a poor man to become bail, who is in insolvent circumstances, the sheriff is answerable for the debt.

From the report of the presiding judge, the circumstances of the case appeared on the trial to be substantially as follows. That a writ on which an order for bail was endorsed, for 211*l.* sterling, was delivered into the sheriff's office, against one *Powell*, who resided in *North Carolina*, at the suit of the present plaintiff, Mr. *Teasdale*. This writ was put into the hands of one of the sheriff's deputies named *Quin*, who took and arrested the body of the defendant in the action. While the defendant was in custody of this deputy, it appeared, that he and the defendant prevailed upon one *Pine* to become bail for defendant's appearance; that after *Pine* had signed the bail-bond, he was induced to go before a justice of the peace, and swear that he was a householder, and worth the sum mentioned in the order for bail, over and above all his just debts, which

Teasdale v. Hart.

affidavit was annexed to the writ as the sheriff's justification, for taking *Pine* as the security for *Powell's* appearance. Upon which, *Quin*, the deputy, suffered the defendant, *Powell*, to go at large. *Powell*, immediately after, went off to *North Carolina*, and never returned; and *Pine* soon after was proved to be in insolvent circumstances. Whereupon the plaintiff, brought the present action against the sheriff, for the misconduct of his deputy, in taking insufficient bail.

In support of the action, it was urged, that the sheriff being an officer of high trust, he was answerable for the misconduct of any one acting under him, and that the conduct of *Quin*, the deputy to whom this writ was delivered, was shameful in a high degree. That *Pine* was notoriously a poor man, who lived in a miserable hovel, and had nothing of respectability attached to him, but depended on his daily labour for his subsistence; he had no visible property, nor the appearance of means, beyond the demands of the day. Under such circumstances, it was said, it was a sad abuse of power on the part of the deputy, to tamper with this poor man, in the first place to become bail; and in the next place, to induce him to go before a magistrate, and take an oath that he was worth the money endorsed on the writ; which was adding subornation of perjury to imposition on the plaintiff in the action.

For the sheriff, in reply, it was said, it would be a hard case to make him answerable for so large a sum of money for the irregularity of one of his deputies; that he was obliged to take the best men that could be got, to do the business of his office; and when they acted to the best of their judgments, it was as much as the law required of him. In the present case it was alleged, that the deputy had pursued the rules of law, laid down in the case of *Teasdale v. Kennedy*, tried in this court in 1793, where it was determined, "that if a sheriff takes a householder in apparent good circumstances as bail, the sheriff shall not be liable in a

Bay's Rep. vol. I. p. 322. *Riley's* edit.

"special action, though the bail should afterwards prove "insolvent;" this, it was said, was a case exactly similar to the case quoted; and the rule prescribed for the government of the sheriff in that case had been pursued in the present one.

The presiding judge then stated to the jury, that it was for them to determine, whether there was an exercise of that sound discretion on the part of the sheriff's officer, which the law requires on such occasions, or not? or whether there was that tampering with the bail, and misconduct on his part, which had been stated by the plaintiff on the present occasion or not? and to govern themselves in their verdict accordingly. The jury retired and soon after brought in a verdict for the plaintiff, with 211*l.* sterling damages.

A motion was afterwards made for a new trial, on the ground that it was a hard verdict, not warranted by law. But the judges refused the motion, as in their opinion, it was a case which turned principally on facts, which were for the consideration of the jury; and the judge who tried the cause, had very properly submitted it to them, on the facts arising out of the cause, and they had found for the plaintiff. The law, they said, was very clear, and well laid down in the case they quoted, on the trial of *Teasdale* v. *Kennedy*. Every sheriff was liable for the acts of all his officers, and all persons acting under him in every subordinate capacity; and they on their parts, are bound to conduct themselves in the like manner as the sheriff himself ought to do, if he was present; and he is not to be let off, on account of the blunders, misconduct, or errors of any of his inferior agents. On the subject of taking bail, the law had laid down reasonable rules; the object was to procure and obtain responsibility for the defendant's personal appearance, or payment of the money, and this was what the law principally required on the part of executive officers; it was

Teasdale v. Hart.

therefore their business to be astute, in obtaining, on all occasions, this kind of security without being guilty of oppression against debtors in their custody. If the sheriff or any of his officers, takes as bail a man who is notoriously insolvent, or who in all reasonable appearance, has not the means of paying the debt in case of non-appearance of the defendant, or if he will not take means of informing himself, whether there are good grounds to believe he is solvent or insolvent, in all such cases he ought to be made responsible. At all events it is but reasonable, that he should be taken to the high sheriff's office, and there detained until he can make the necessary inquiries, which can easily be done, by a recurrence to the tax-office, register's office, and such like places, where information on that subject is to be had. But it may happen, that a man offered as bail, may be good, where it is not in the power of the sheriff to find out in the above offices, whether he is able to pay the money or not; as in the cases of mercantile men, or men who may have money in the funds, or stock, or out on interest. In all such cases, a reasonable degree of diligence, as to the responsibility of the person offered as bail, and the oath of the party, may and ought to be a justification to the sheriff, in taking such bail.

In the case under consideration, however, there does not appear to be any thing to justify the sheriff; on the contrary, there is too much reason to fear, that his deputy tampered with the poor man who was offered as bail; that there was nothing around him, or attached to him, which could give reasonable grounds to believe he was able to pay this debt, in case of the non-appearance of defendant. No pains were taken to gain information on that head, nor does it appear that he was ever taken to the sheriff's office, until the necessary inquiries could be made, and there is too much reason to fear, also, that the affidavit which was made was a colourable one, merely fabricated for the purpose of giving the appearance of legality to the transaction; but all

the circumstances were before the jury, who have found for the plaintiff, and the court can see no reason to disturb their verdict.

Tensdale v. Hart.

Rule for new trial discharged.

Present, BURKE, GRIMKE and BAY.

WILLIAM LUYTEN *against* JOHNSON HAYGOOD.

Charleston District, 1798.

CASE on a note of hand. Defence, usury.

On the trial before the jury, the defendant, under the second clause of the act against usury, was called upon as a witness, to prove the usurious transaction. And after his counsel had stated what was intended to be proved by him, the plaintiff's counsel then moved, that his client might be sworn under the proviso mentioned in said clause, to rebut the testimony proposed to be given in evidence by the defendant. The proviso is in the following words: "provided, "that if the person or persons (*i. e.* the lender or lenders of "the money) against whom such evidence is offered to be "given, *will deny on oath* in open court, the *truth of what* "*such witness* (*i. e.* the defendant or borrower) *offers to* "*swear against him*, then such witness (the defendant) "shall not be admitted to be sworn; and if the plaintiff "shall forswear himself, he shall be subject to the pains and "penalties of perjury." Upon the construction of this proviso, it was insisted on the part of the plaintiff, that he should barely be confined to the denial of the single fact *of usury*, or *not usury*; and that he should not be asked, or bound to answer, any other question or questions touching the transaction. To this it was replied, that such a

Where a defendant in a usurious cause is offered as a witness to prove the usury, under the terms of the act, and the plaintiff is to be sworn to rebut the testimony proposed to be given by defendant in such case, the plaintiff is not to be confined to the bare acknowledgment or denial of the usury, but is obliged to answer faithfully all questions relative to the whole transaction.

Luyten v. Haygood.

rigid construction of the proviso would be stifling the truth, and suppressing all the means of coming at the ends and designs of the act, in detecting usurious contracts, and preventing the evils it contemplated. The presiding judge, BAY, observed, that this was the first time this point had come before the court, and it appeared to him, that the strict construction of the proviso contended for by the plaintiff's counsel, would render the act nugatory, for these kind of transactions are generally in secret, and depended upon circumstances, concerning which, men differed widely in their opinions; some forming one conclusion of what constituted usury, and others again, a very different one respecting it; so that the bare affirming or denying the fact of usury, or not usury, would by no means answer the ends of justice. That the true construction must depend upon facts, and oftentimes a long train of them; and there was no coming at the real truth, but by a full investigation of those facts: and the words of the act by no means precluded this examination, for the words are these, if the plaintiff, the lender, *will deny on oath, the truth of what the defendant, the borrower, offers to swear against him*, he, the defendant, shall not be allowed to be sworn as an evidence. What then is meant by the truth of what the borrower offers to swear, but the truth of all the circumstances of the transaction, and these are what the plaintiff is bound to answer or deny on oath. This, he said, appeared to him to be a fair construction of the proviso in the act. The common law renders both plaintiffs and defendants incompetent witnesses in their own causes, in all cases. This law, however, removes their incompetence in cases of usury. When this incompetence is removed, they then stand upon the footing of competent witnesses on both sides, and may be examined on both sides fully.

The plaintiff, Mr. *Luyten*, was then sworn, and so far from denying what the defendant, Mr. *Haygood*, offered to

swear, that he corroborated every circumstance; upon which the jury found for the defendant.

A new trial was moved for, on the ground that the presiding judge had mistaken the law, and that the plaintiff had been compelled to answer questions, which he was not bound by the act to answer.

When, after argument, the judges were unanimously of opinion, that the construction given to the act was the true one. The opinion of the court on this point was delivered by Mr. Justice WATIES, as follows:

The plaintiff has not been compelled to do more than he was bound to do, under a reasonable construction of the act. "The defendant is a competent witness to prove the usury, "unless the party charged with the offence will deny, on "oath, the truth of what the defendant offers to swear "against him." Now although the plaintiff is only required to deny what the defendant offers to swear to, yet as the defendant may allege what he pleases, the plaintiff may consequently be brought under a general examination; and why should the plaintiff complain of this? He may indeed be obliged to disclose more of the truth than he is willing to do; but if the examination leads him to confess facts, which shew a usurious transaction, he only does justice to the other party, and fulfils the end and design of the law.

This is a reasonable construction of the act; for if the plaintiff is allowed to prevent the defendant from giving evidence of the usury, by his own oath, it should be on the condition that he will himself state the whole truth of the transaction.

Rule for new trial discharged.

Present, BURKE, WATIES and BAY.

Charleston District, 1798.

JOHN RAMSAY *against* The COURT OF WARDENS.

A prohibition will lay to the inferior court of the city of *Charleston*, where it takes cognisance of a note of hand in which the plaintiff has given a receipt for 30 dollars, in order to give the city court jurisdiction of the case.

UPON a motion for a prohibition.

This was a motion for a prohibition, to restrain the inferior court of the city of *Charleston*, from proceeding in a case, which it was alleged exceeded the jurisdiction of the court of wardens; which was authorized to hold pleas in civil suits, to the amount of 20*l.* sterling, equal to 88 dollars, but no further.

The note on which this suit was brought, was originally given by the defendant for 115 dollars, on which the holder, Mr. *Ehrick*, had written a receipt for 30 dollars, which reduced it down to 85, in order (as it was said) to give jurisdiction to that court. This court sat monthly; the recovery of small sums, therefore, in it, was much more speedy than in the court of common pleas, which sat but twice a year; and it often happened that the courts could not go through the docket of civil causes, during the term.

On the trial before the wardens, the defendant took exception to the cause of action, as exceeding the jurisdiction of the court, but they ruled that a plaintiff had a right to give what credit he pleased on the note; that it was no injustice done to him, by giving such credit, but a favour conferred, by giving up a right *pro tanto;* and therefore gave judgment for the balance; and the plaintiff was about taking out an execution against defendant's goods for the amount. This, was therefore, a motion for a prohibition, to stop the court of wardens from proceeding any further in the cause.

In support of this motion, it was said, that if a court of inferior limited jurisdiction exceeds its authority, or overleaps the boundaries prescribed to it, this court ought to restrain it by a prohibition. 4 *Bac. Abr.* tit. *Prohibition*, p. 253.

Ramsay v. Court of Wardens.

That the original debt in the present case was 115 dollars, not one shilling of which had ever been paid by defendant, though he was ready and willing to pay every farthing when called upon in a court of competent jurisdiction. That the plaintiff, Mr. *Ehrick*, knowing that this sum was above the jurisdiction of the court of wardens, had voluntarily, and without the knowledge or consent of the defendant, wrote a receipt on the note for 30 dollars, in order to give the wardens' court cognisance of the cause. This, it was urged, was not a *bona fide* transaction, but a colourable one, *contra fidem*, for the express purpose of creating a jurisdiction, in a case which the policy of the law had forbidden that court to intermeddle with. The law is therefore very clear, that if a credit is given for *a shilling*, in order to give an inferior court jurisdiction, where it had none before, *it is a legal fraud*, and a prohibition will lie. As in the case of *Clarke v. Clarke*, *Palm.* 564. where a suit was brought in the hundred court for forty shillings, in which action the plaintiff confessed that he was satisfied one shilling, which being done to give that court jurisdiction, (having jurisdiction only of all sums under forty shillings,) and to defraud the superior courts, a prohibition was granted. 4 *Bac.* 253.

So also, a contract where divers small sums of money were to be paid at different times, under forty shillings each, the plaintiff proceeded in divers plaints on each part separately. The court restrained him by prohibition, because though there be several contracts, yet inasmuch as they were all due, and plaintiff might have brought one action, he ought to have done so, and sued here for his money, and not put the defendant to unnecessary vexation, any more than he can split an entire debt into divers, to give an inferior court jurisdiction, *in fraudem legis*.

Per Curiam. However plausible the relinquishment or giving up part of a debt may at first glance appear, yet if it be done with a view of giving an inferior court jurisdiction of a cause, where the law had excluded it before, *it is a*

Ramsay v. Court of Wardens.

legal fraud; it is eluding the wisdom and foresight of the law, and breaking down those guards which had been placed around these inferior jurisdictions. No man, therefore, shall be allowed to create a jurisdiction for himself, by changing the real position of parties in any contract, by his own act, without the assent of the other party to the contract.

The receipt on the note in question, for the purpose of giving the court of wardens conusance of the cause, was clearly a colourable transaction. It was in effect changing the nature of the original contract, and makin it a subject of inferior jurisdiction; which, in its origin, was only cognisable in the supreme court of judicature. The court of wardens had no right to intermeddle with it.

Let the rule for the prohibition be made absolute.

Present, BURKE, GRIMKE, WATIES and BAY.

Charleston District, 1798.

MARY GIST and others, Legatees of BENJAMIN CATTELL, deceased, *against* JOHN BOWMAN et al.

One chancellor in the court of equity is competent to do all matters and things appertaining to the equity jurisdiction, preparatory to a final hearing, altho' there may be no other judge at the time in office. A defendant in a cause depending in that court, who is in the custody of the sheriff under an attachment for a contempt in not putting in an answer to a bill of discovery filed there, is not entitled to his discharge on a writ of *habeas corpus* before the common law judges, notwithstanding there may have been but one chancellor in office at the time when such attachment was issued.

AT a special meeting of the Judges at chambers, at *Charleston*, 17th of *March*, 1798. Present, BURKE, WATIES and BAY.

This was a cause originally depending in the court of equity, out of which an attachment for a contempt had issued against the defendants, for not putting in their answers agreeable to the rule of that court. Upon this attachment, the defendant, Mr. *Bowman*, was taken and im-

prisoned. Whereupon, he applied for and obtained a writ of *habeas corpus*, and was brought up before the common law judges, when a motion was made by the *Attorney-General*, that he might be discharged from his arrest and imprisonment. The ground on which he principally relied in favour of the motion, was, that the *powers of the court of equity had ceased*, or, in other words, that there was *no such court in existence*; consequently, that the attachment by virtue of which the defendant had been arrested was a nullity. The court of equity in this state consisted of three judges or chancellors, originally, one of whom, Chancellor *Hutson*, had lately departed this life, and Chancellor *Mathews*, another, had lately resigned, so that Chancellor *Rutledge* was the only remaining judge in office. It appeared that the complainants had duly filed a bill of discovery against the defendants in equity, and that rule after rule had been taken out against them to file their answers, but to no purpose; at length this attachment was taken out for a contempt in not answering the bill of complaint, on which the defendant was arrested.

The *Attorney-General* said, this arrest was not warranted by law, inasmuch as the act which established the court of chancery contemplated three judges. That the restrictive clause, however, authorized any two of them to exercise some definitive powers therein named, and any one of them to exercise certain other powers, preparatory to a final hearing. But, he insisted, that these latter powers were given to the individual members of the equity bench, under an idea that after such individual judge had made all the necessary preparatory orders in a suit, there was a competent number of judges remaining on the bench to proceed to a final hearing and determination of a cause. As, however, there was not a competent number of judges to hear and finally determine a cause, and make a decree, it was a nugatory act for any one judge to make any interlocutory or intermediate order, in a case which could not be decided

Gist and others v. Bowman et al.

and ended. Hence, he inferred, as it was essential to every court of competent jurisdiction to put an end to controversies in such courts, if it so happened, either by death or resignation, that that could not possibly be done, then, he said, the court had died a natural death, and all its powers were at an end. If then the court of chancery had by these contingencies become extinct in this state, it followed as a natural consequence, that every process pretending to come from it must be null and void. Any arrest, therefore, by virtue of such pretended process, must be illegal, and it then became the duty of the common law judges, under the *habeas corpus* act, to discharge the defendant.

Mr. *Desaussure*, counsel for the complainants in equity, against the motion, contended, that although one judge could not proceed to a final hearing and determination of a cause in equity, yet he was fully competent, under the acts of 1784 and 1791, to do all other acts appertaining to the jurisdiction of a court of equity, and to make all rules and orders preparatory to a final hearing. That he was authorized to grant injunctions, issue *ne exeats*, and to award every other process of the court necessary for the attainment of justice. That the present chancellor had, ever since the resignation of Chancellor *Mathews*, been in the constant habit and practice of issuing all these, and every other process of the court, as occasion called for or required, and this was the first time his authority had ever been called in question. It was further insisted, that the court of chancery was one of the grand branches of the judicial system of this country, and had been so ever since the formation of civil government in it, and our late constitution had secured it to posterity. That the judges in equity, like the common law judges, hold their commissions during good behaviour, and they cannot be removed from office but by impeachment for improper behaviour, so that the present judge in equity possesses all the powers and authorities, to do all matters and things within the equity jurisdiction, as fully to all intents and purposes as

he did when the other judges were in the exercise of their functions; and that if the vacancies occasioned by death and resignation had not been filled up, and other chancellors appointed, it was not his fault; he was at his post, ready to do all things for the advancement of justice which the duties of his office enjoin upon him, and all his acts, as such, were binding and efficacious, as far as he went. He asked now the circumstances of the present case stood? They were very simple, and lay within a very narrow compass, and all within the powers of any one of the chancellors. A bill of discovery had been filed against the defendant. What was wanted? Plain answers to the allegations in this bill. But defendant would not answer, and the present proceeding was the method prescribed by the rules and practice of that court to compel an answer. The mode of discharge was very easy, without recourse to a *habeas corpus*, or to the common law judges. Let defendant put in his answer, and the equity judge, would discharge him as a matter of course, as soon as he had complied with the rules of court. He next contended, that the common law judges were not authorized to interfere in a case of this kind; they had no cognisance in the case. This was an attachment for a contempt out of the court of chancery; a court of supreme uncontrolled jurisdiction, and which, in many instances, controlled even the supreme courts of law themselves. The *habeas corpus* act did not embrace the case; for contempts are expressly excepted out of the purview of the statute, and the judges are forbidden to interfere in cases of prisoners committed for contempts.

The judges, after hearing the arguments, and fully considering this case, were all of opinion, that they had no jurisdiction of the matter. It belonged, exclusively, to the court of equity. That it did not by any means follow, that because there was not a full bench of chancellors to make a final decree in a cause, that a single chancellor could not perform the duties assigned to any one member of the

Gist and others v. Bowman et al.

bench, preparatory to a final hearing. Nor was it to be presumed, that suitors would be long under the inconvenience of a defective equity jurisdiction, arising from the vacancies on the bench. But, in the mean time, until the vacancies were supplied, and other judges appointed, the remaining chancellor still in office was fully authorized to go on, and fulfil all the duties assigned to any one chancellor, till others were appointed. That the present was a case preparatory to a hearing. It was a proceeding to compel a defendant to put in his answer to a bill, and came expressly within the powers given to each of the equity judges, who best knew their own powers and authorities, in cases within their own jurisdiction. That the present remaining chancellor Rutledge, was eminent both for his legal and equitable knowledge, and ranked high in the estimation of his country, who had elevated him to so important a trust, and they had no doubt, therefore, that he would do what was right and proper on the occasion. To him, therefore, they thought it their duty to refer the present case. That under the *habeas corpus* act they had no authority to liberate men committed for contempts. Prisoners, under such circumstances, were expressly excluded from the benefit of that act.

The motion for bail was discharged and defendant remanded to the custody of the sheriff.

N. B. At the next meeting of the legislature, after the above determination, two chancellors were elected to fill up the vacancies on the equity bench; so that, probably a case like the above, may never happen again. Note further. Since the determination of the above cause, and the filling up the vacancies in the equity bench, an act of the legislature has authorized the appointment of two additional chancellors, any one of whom is competent to hear and determine a cause, and to make a decree, with liberty to either party to appeal to a court established for that purpose.

FERDINAND HOPKINS *against* ALLAN DE GRAFFENREID. *Pinckney District*, 1798.

TRESPASS to try title to lands.

In support of the plaintiff's title, a grant was first produced to *James Moore*, for 350 acres of land, on *Sandy* river, dated 4th *November*, 1763. Two surveyors, to wit, *Moses Hill* and *Joseph Gaskins*, were then called to prove the identity of the land, and that it was in the possession of the defendant, and that their resurvey corresponded with the original plat annexed to the grant.

The last will and testament of *James Moore*, the original grantee, was next produced, and as two of the witnesses were dead, and the other out of the state, a witness, *John Pratt*, was called to prove all their hand-writings.

Mr. *Nott*, of counsel for defendant, here objected to the swearing of this witness, to prove the hand-writings of all the witnesses to the will, insisting that there ought to be a separate and distinct witness to prove the signature of each witness to the will, otherwise it would not come up to the requisites of the statute of frauds. But this objection was overruled without argument, by BAY, J. who presided on the trial.

Mr. *Pratt* then proved the hand-writings of each of the three witnesses to the will; that two of them were dead, and the other resided in *Georgia*, namely, *Geo. Nunn*.

The deposition of *Geo. Nunn*, taken on interrogatories, was next produced, in which he proved the execution of the will by the testator, and the attestation of it by all the witnesses, and that the testator was of sound mind and memory when it was executed.

The will was then read; it bore date the 15th *January*, 1779. In this will the testator gave his wife *Dorothy* a life

Where two witnesses to a will are dead, and the third out of the state, proof of their hand-writings by any one credible witness, with the proof of testator's hand-writing, is sufficient proof to establish the will.

So proof of the hand-writings of the witnesses to a bargain and sale of lands, who are dead, or out of the state, with the proof of the hand-writing of one of the grantors, where the other grantor or party to such bargain and sale is not accustomed to write her name, or to transact business, ought, under peculiar circumstances, to be submitted to a jury, as presumptive evidence that such grantor had executed the deed also.

Nonsuit set aside for refusing to let a cause go to the jury, for want of the proof of the hand-writing of one of the grantors, under the above circumstances.

Hopkins v. De Graffenreid.

estate in the land in dispute, and the reversion in fee to his son *Thomas Moore*.

The next link in the chain of titles produced, was a bargain and sale from *Thomas Moore* the son, and *Dorothy* the widow of *James Moore*, the testator, of the land in dispute, to *David Hopkins*, the father of the plaintiff in this action. The witnesses to this deed, it was stated, were dead or out of the state; but in order to supply the defect of this testimony, several witnesses were called. *Hugh Thomas* proved the hand-writing of one of the witnesses to the deed, and that he was dead. *William Jenkins* proved the hand-writing of the other witness to the deed, and that he was out of the state. Another witness proved the hand-writing of *Thomas Moore*. The last and only remaining part of the proof of this bargain and sale to be established, was the hand-writing of old *Dorothy Moore*, the widow, who had the life estate in the land. Two witnesses were called for that purpose, *Anderson Thomas* and *John Embre*, (the latter of whom prevaricated exceedingly,) but neither of them did, or would prove the hand-writing of *Dorothy Moore* the widow. Here Mr. *Nott*, for defendant, called for a nonsuit, which was opposed by Mr. *Smith*, counsel for plaintiff, who argued that this case, under all its circumstances, should be permitted to go to the jury, in order to presume from the whole of the case, the execution of the deed from *Dorothy Moore*, who had the life estate.

Bay, J. observed, that in this case, a very clear life estate was brought down from the original grantee to *Dorothy Moore*, the widow; and, however clear and regular the evidence was on every other part of this case, and he was free to confess it was exceedingly clear on all the other points, yet there was not a tittle of testimony to shew that she had ever parted with her right; there was therefore a total defect of evidence as to the tranfer of her estate. To suffer a case therefore to go to the jury, when there was nothing to support the plaintiff's right, would, in his opinion,

be a nugatory act. The plaintiff by his own shewing, had traced the estate *down to the widow*, but had offered nothing to shew she had ever parted with her interest in it to the plaintiff, or to any other under whom he claimed.

The plaintiff was accordingly nonsuited, agreeably to Mr. *Nott's* motion.

This case was afterwards taken up to the court of appeals at *Columbia;* where a motion was made to set aside this nonsuit, and to have the cause reinstated on the docket in *Pinckney* district.

Mr. *Smith*, in support of this motion, contended, that there were certain grades or degrees of evidence known in our law, which under different circumstances were all admissible in our courts of justice. That the first and most important rule of evidence was, that the highest evidence the nature of the thing is capable of, ought always to be given.

The next rule was, where the highest cannot be procured, then the next best evidence should be offered that can be got. And this rule he said, was divisible again from violent presumptions which are next to certainty, down to reasonable presumptions arising out of the peculiar circumstances of the case, and that in all cases of this latter kind the juries were the competent judges, and not the court. Now to test the case under consideration by these principles, he said, there were two witnesses to the bargain and sale offered in evidence from *Thomas Moore* the son, and *Dorothy*, the widow of *James Moore*, to *David Hopkins*, under whom the plaintiff claimed. That one of these witnesses was dead, and the other out of the state, so that his attendance could not be procured, nor could any process compel him to attend and give evidence, but both their handwritings had been proved; also the hand-writing of *Thomas Moore* the son, to whom the fee of the land had been

Hopkins v. De Graffenreid.

given, after his mother's death by the testator's will. So far, he said, every part of the testimony given was clearly within the well known rules of law. The only part wanting was the proof of the hand-writing of *old Mrs. Moore*, the other party to this deed. This old lady, he said, was far advanced in life, and very infirm; that she had always lived in a remote part of the country, and probably had not signed her name for fifty years before the deed was made. The greatest part of her life she passed under the direction of her husband, and after his death, her son transacted business for her, so that it is not at all improbable, that she never signed her name from the time she left school in her infancy, till she was called upon to sign this deed. No wonder, therefore, that no witness could be found to prove her hand-writing. Under these circumstances, therefore, a greater latitude ought to have been allowed, than in common or ordinary occasions. The rule of law ought not to have been too rigorously laid down; but it ought have been submitted to the jury, to presume from the whole circumstances of this case, and to determine whether she had signed this deed or not. It was well known, he said, that presumptions arising from circumstances, was a species of evidence often resorted to, and admitted in our courts; and proof of such circumstances, which could not have existed, *unless a particular fact had pre-existed, to give rise to them*, had been admitted as presumptive *evidence of such fact*. Was it to be presumed, that two discreet disinterested men, would have signed their names, and attested the execution of a deed, unless such deed had really existed? The thing is not supposable. The son also joining in this deed, and conveying away the fee of the land, is another circumstance to prove, that it is highly probable the mother must have joined her son in conveying away her life estate, which she could not long enjoy. All these were circumstances very proper for the consideration of the jury, and should have been submitted to them by the district court instead of directing a nonsuit.

See case of *Brown* and *Frost, ante.*

1

Hopkins v. De Graffenreid.

Mr. *Nott*, against the motion, said he had taken two grounds on the trial, either of which he presumed would entitle his client to a nonsuit. The first respected the will, to which there were three subscribing witnesses; two were dead, and the third was out of the state. To come up to the requisites of the statute of frauds, the hand-writing of each witness should have been proved by a separate witness; otherwise, one witness might substantiate a will, which required three to pass a freehold. The second was the objection on account of Mrs. *Moore's* hand-writing not being proved. On this second ground he succeeded, though he conceived he was entitled to it on the first. That the nonsuit was properly ordered on the second ground, by the circuit court, as the hand-writing of *Dorothy Moore* had not been proved. No matter how clear all the other parts of the testimony was; this important link in the chain of plaintiff's title, was wanting. The rule of law, in cases where witnesses to a will or deed were dead or out of the state, was first to prove the hand-writing of the witnesses, then the hand-writing of the party to the will or deed. 3 *Burr.* 1247. this was a case of a will. Without this last and essential part of the proof, all the rest was unavailing. The same doctrine is laid down in *Doug.* 89, 90. There it is said, if you cannot procure the subscribing witness to a bond, you must prove the obligor's hand-writing to the bond. The presumptive evidence contended for, he said, was dangerous in the extreme, as it always held out a temptation to a jury, to put their own construction on slight or immaterial circumstances, whether they brought a case within the rules of law or not, which went to lessen the security men had for their rights in a court of justice. What *was evidence* and what *was not*, was one of the sacred duties of the court always to determine; and should not be committed to the uncertain, fluctuating sentiments or opinions of uninformed jurymen.

The judges were all of opinion, that the first objection taken on the trial was very properly overruled by the pre-

Hopkins v. De Graffenreid.

Gilb. Dev. 96. 1 *Will.* 216.

siding judge; that the proving the hand-writing of the three witnesses to a will by any one credible witness was sufficient, if they were dead or out of the state; it did not by any means impugn or contravene the statute of frauds, which required three witnesses to a will; on the contrary, it established the requisites of the statute. The statute did not require that there should be three witnesses to prove a will; (though if they are all alive it is best to produce them;) any one witness to it, is sufficient to make such proof, if the others are dead or absent. There is therefore a great difference, between the making of a will on the part of a testator to devise lands, and the proof of it afterwards, either before the ordinary or in a court of justice. In a court of justice, a will is considered only as a species of conveyance of lands, and therefore, it may be proved like any other deed. But as to the other objection, BURKE and GRIMKE were of opinion, that too rigid a construction was given to the rule of law, as to the proof of Mrs. *Moore's* hand-writing to the bargain and sale; and that the nonsuit ought not to have been ordered, but it should have been sent to the jury under all the circumstances of the case, to determine whether she had or had not executed the deed under consideration. They admitted the general rule of law as laid down in 3 *Burr.* 1247. and in *Doug.* 89, 90. that it is necessary after you have proved the hand-writings of the witnesses, then to prove the hand-writing of the party to the bond or deed. But said, that this case formed a strong and marked exception to the general rule on this head. In the usual and ordinary transactions between men in the management of business with each other, the rule certainly ought to be adhered to. In a case, however, like the present, where the hand-writing of an old infirm woman, who did not sign her name more than once probably in fifty years, it was next to an impossibility to find a man living, who could prove her hand-writing; therefore, the proof of all the solemnities usually attending the execution, delivery and attestation of such a deed, as were not likely to happen, un-

Hopkins v. De Graffenreid.

less she had executed it, ought to have gone to a jury, as presumptive evidence for them, to determine whether she actually did sign, seal and deliver it, or not. The rule of law, therefore, quoted by the plaintiff's counsel on the argument, would well apply in this case; namely, where the best evidence a thing is capable of cannot be procured, then the next best ought to be admitted; not as conclusive, but as presumptive evidence of the fact.

The nonsuit was therefore set aside, and the cause ordered to be placed on the docket in *Pinckney* district, for trial again at the next court.

Present, BURKE, GRIMKE and BAY.

N. B. BAY, J. afterwards, upon reconsidering this case, assented to the above decision.

WILLIAM DAUB *against* JAMES MARTIN.

Columbia, 1798.

CASE from *Camden*.

This was an action of debt on a judgment in trover, in which the jury under the direction of the judge, refused to allow interest.

A judgment in an action founded on *tort* is not one of those cases which come under the instalment act of 1787, and in an action upon such judgment the plaintiff is not entitled to *interest*, being a case originally sounding in *damages*.

A motion for a new trial was moved for by Mr. *Mathis*, on the ground that all judgments under the instalment act of 1787, carry interest; and the presiding judge in this case, had directed the jury not to allow it. But the motion was overruled, because this was a suit originally on a *tort*, and the plaintiff was entitled to his execution on enter-

Daub v. Martin.

ing up his judgment. The instalment act of 1787 did not prevent him, and if he chose to let the judgment remain over so long unsatisfied, it was his own fault. Besides, this was an action in its origin sounding in damages, and it was not the usage and practice of the court to allow interest on damages. They were therefore of opinion, that the presiding judge directed the jury properly not to allow interest.

Rule for new trial discharged.

Present, BURKE, GRIMKE and BAY.

Columbia, 1798.

DAVID HOPKINS *against* The Administrators of M'PHERSON.

A writ taken out against one administrator where several are appointed and qualified to administer on the intestate's estate, is null and void, and will not prevent the statute of limitations from running against a debt. A second writ against all the administrators after a discontinuance of the first, will not cure the defect where the statute has run before the lodging of the writ in the sheriff's office.

THIS was an action of *assumpsit*. Plea *non assumpsit infra quatuor annos*.

Verdict for defendants under the direction of the court.

Motion for a new trial, on the ground of misdirection. The circumstances of this case, as reported, were these: A writ was first taken out against one of the administrators alone, when several had been appointed and qualified; the plaintiff upon discovering his mistake, discontinued his action and commenced another one against all the administrators; the first writ was in time to bar the statute of limitations, but the second was lodged after the statute had run out against the debt; so that the only question was, whether the lodging of the first writ had taken the case out of the statute or not? The court was unanimous, that the first being void, it gave no right whatever to the plaintiff; and

when the second writ (which was valid) issued, the statute of limitations had run out and barred the recovery.

Hopkins v. The Administrators of M'Pherson.

Rule for new trial discharged.

Present, BURKE, GRIMKE and BAY.

The Devisees of PHILIP HAWKINS, deceased, *against* AMBROSE ARTHUR and others.

Orangeburgh 1798.

TRESPASS to try title to land, before BAY, J.

This action was brought to try the title to a tract of land, adjoining the town of *Granby*, commonly called *Saxagotha* town.

A reservation of lands for the use of a town, is a covenant in law between the state and people, that those lands shall be appropriated only for the use of the inhabitants of said town, and for no other purpose; so that any grant obtained for the said lands afterwards, is null and void as much as a junior grant for lands which had been previously granted away.

Mr. *Holmes*, on the part of the plaintiffs, in support of their title, produced a grant to *Job Marion*, for 764 acres of land, dated in *February*, 1770, then said to be situated on *Santee* river, but in fact and in truth, situated on the west side of the *Congaree* river. He next produced regular conveyances from *Job Marion*, the grantee, to *Benjamin Farrow*; and also conveyances from *Farrow* to *Philip Hawkins*, under whom the plaintiffs claimed.

When these conveyances were inspected and examined by the surveyors, it appeared that only 72 acres were in dispute with the present defendants, which included the glebe lots in the town of *Granby*, and part of the common.

Mr. *Purcell*, and Mr. *Bynum*, two surveyors, were then called and sworn, and they both agreed in opinion with regard to the situation of the lands in dispute, which lay between the main road leading to *Charleston* and the *Congaree* river, and that it *was a part of Saxagotha town*; and both

Devisees of Hawkins v. Arthur and others.

the surveyors concurred in opinion, that the plat annexed to *Marion's* grant, and the land specified in *Hawkins's* deed, covered or included the lands which were called and known by the name of the *Saxagotha* town lands; so that upon the whole, there was no dispute about the location or situation of the lands in dispute, as they were clearly included within the grant and the conveyances. Here the counsel for the plaintiffs rested his case, alleging that they had deduced a clear and regular title down from the original grantee, to the plaintiffs in this action, and had also established the fact of the location of the land in dispute being within the boundaries.

Mr. *Starke*, of counsel for defendants, stated, that the land in dispute was part of the town of *Saxagotha*, which had been laid out and reserved for the use of the *German* inhabitants of the township of *Saxagotha*, which was of considerable extent, and formerly had the privilege of sending a representative to the legislature of the state, and that it of right belonged to them and their descendants at this day; but that a spirit of speculation had, in or about the year 1770, gone abroad in *America*, (as it had done at several periods since,) and particularly in this then province; and that some artful person well acquainted with these lands and their situation, as well as with the adjoining lands around them, had made use of Mr. *Job Marion's* name, as a cover to obtain a grant for the 764 acres of land, the exact quantity reserved for the use of *Saxagotha* town and township. He then stated, that *George* II. late king of *Great Britain*, so long ago as the year 1730, soon after his accession to the throne, issued a proclamation to his countrymen in *Germany*, offering bounties of land, and other advantages civil and religious, in order to induce them to emigrate and settle in the upper part of this then province of *South Carolina*, in order to form a strong barrier against the incursions of the savages, who had been long troublesome in that part of the country. That in consequence of that proclamation,

numbers of the inhabitants of that part of *Germany*, which the name of the township bears at this day, did emigrate with their families to *Carolina*, and settled themselves down in the township which its name imports; where they and their descendants have remained to the present period. That for the accommodation and general convenience of these new settlers, a town of considerable extent was laid out, and reserved for them and their descendants inhabitants of the said township for ever, called *Saxagotha* town; which is admitted to be the tract which includes the land in dispute. That this town contained 764 acres, the exact quantity mentioned in *Marion's* grant, and both the surveyors who have been examined agree that it is the same land.

He next stated, that from the loss of many of the old records, and the carrying off a great many others of them by the enemy during the revolutionary war, and other public misfortunes which befel this country before and about that period, he had it not in his power to produce the council books of the old province of *South Carolina*, which contained the public proceedings of the then government of the province, and the transactions of the king's governors and councils, to whom the executive authority was entrusted; so as to shew the precise act of the *British* government, in making this reservation of land for a town for the use of the *German* inhabitants, who had settled in the above township, which was the highest evidence the thing was capable of. But he would offer the next best evidence of this application or reservation for the above purposes, which was an ancient plat or plan of the town of *Saxagotha*, under the hand of *Ralph Humphreys*, a former deputy surveyor-general of the said province, taken from the original entered in the council books, made by order of the governor and council of *South Carolina*, in pursuance of the king's instructions for that purpose, dated in 1732, and signed and certified by the said deputy surveyor-general. This, he contended, was such proof of the actual existence of the

Devisees of Hawkins v. Arthur and others.

original, as ought to be admitted at this day, to prove the reservation and laying off of the town.

Mr. *Holmes*, the counsel for the plaintiff, objected to this plan being given in evidence, as not being of the highest nature. But the objection was overruled by the presiding judge, on the grounds, first, that transactions of this kind, such as reservations of land by the *British* government, for towns, forts, fortifications, and other special public purposes, differed greatly from grants, either under the great seal or the colonial seals; or even deeds or conveyances from one individual to another. The mode observed in making these reservations, was first, a declaration or rather resolution entered in the council books, that certain portions of land should be for ever reserved by the crown for some of the above public purposes; and directions were accordingly given to the surveyor-general, to lay off, by metes and bounds, the lands so reserved. After this survey was made and certified by the surveyor-general, it was returned to the governor and council, and the plat of such reserved lands, was entered in the council books, there to remain as a perpetual memorial or record of such appropriation. After which, there was no other evidence of such reservation, but the copies of plats certified by the surveyor-general, or his lawful deputies. Whereas, in the case of grants under the seal of the government, they were given to individuals, for their private use and benefit only, and they had the custody of these grants or charters, and could always have them ready to produce when called for, to shew their rights. So likewise in the case of deeds and conveyances, which is the reason why the law always requires that they should be produced as the highest evidence, or their loss or destruction regularly accounted for. Not so with regard to reservation of lands for public purposes, where the government remains as trustee for the public. In such case, there never was any grant or deed to individuals to produce. The only evidence of such reservation, is a copy of the plat entered in the council books, shewing

the lands reserved. Another ground for overruling the objection, was, that ancient deeds above thirty years standing prove themselves, and may be given in evidence without proof, especially where possession has gone along with it, and it was not denied, that many of the inhabitants were in possession of the lots in this reserved town. Upon the same principle, ancient plats and maps may be given in evidence. In the present case, the plat has every appearance of regularity and authenticity about it, signed and certified by the proper officer of the government, and is of more than sixty years' standing.

The plat was then produced and offered in evidence to the jury, and it appeared to be the same land, which was covered by *Marion's* grant, and containing exactly the same quantity. On this plat or plan of the town, the lots for the use of the inhabitants of *Saxagotha* township were laid down; and streets and squares for public purposes, were fairly and regularly delineated and represented on it; and among other things, there appeared to be a *square reserved for a church*, another for a court-house and gaol, another for a public market, and several others for public purposes. On this plan was also laid down and represented, a common appurtenant to the said town, for the use of the inhabitants and their cattle, and also sites for forts and fortifications, which were afterwards built and erected, for the defence of the said inhabitants against the depredations and incursions of the savages. So that every thing appeared to have been done by the crown, not only for the appropriation and reservation of the land itself, but for the convenience, comfort, security and protection of the inhabitants, who were to people and inhabit it.

Mr. *Starke* then called several old witnesses, who proved that a church had been built on the square reserved in the town for that purpose, in the year 1760; and that there had been an old church on the same spot before, which was called *Saxagotha* town church. An old man named

Devisees of Hawkins v. Arthur and others.

Baughman, particularly swore, that he helped to build the church in the year 1760. After this testimony, Mr. *Starke* produced a number of old grants to the inhabitants of *Saxagotha* township, for farms, or plantations, or bounty, in each of which was a grant of a town lot also in *Saxagotha* town, as an appurtenant to their said plantations or farms; all which, he contended, proved incontestably, that this land had been reserved by the crown of *Great Britain* for a town, for the use of the inhabitants of *Saxagotha* township, and their heirs and descendants for ever. Here, he said, he would rest his clients' case, and submit it to a jury of the country.

After the testimony to the jury was closed on both sides, *Holmes*, for the plaintiffs, contended, that the fee of the soil had never passed from the crown of *Great Britain* (except for a few town lots) till the grant to *Marion*. That however the *British* government might originally have intended this land for the site of a town, yet time and circumstances had changed. They had seen that it would not answer for that design, and accordingly had granted it away for the purposes of cultivation and improvement as a farm. That as to the town lots which had been granted before the letters patent to *Marion*, he did not mean to contend, that the proprietors were not entitled to them. He was willing, therefore, that the jury should leave every such lot out of their verdict, if it was possible for them to designate them; but contended, that his clients were entitled to the residue of the 764 acres, whatever that might be, more or less.

Marshall, in reply for defendants, insisted, that the royal faith was pledged by the proclamation of *George* II. to his countrymen, whom he wished to settle in *South Carolina*; and it was consummated by his governor and council in *South Carolina*, when the town was laid off, and the plat returned to the council, and entered on the council books. This, he urged, was an act as formal, and as substantially

Devisees of Hawkins v. Arthur and others.

valid, as if he had affixed the great seal of *Great Britain* to it, or his seal of his then province of *South Carolina*. From that moment, the crown parted with its right and control over the soil of *Saxagotha* town, and became a trustee for the emigrant *Germans*, and their descendants for ever. He said, the time, the occasion, and the object were all worthy the consideration of the freemen of *South Carolina*. The time was a disastrous one; when the frontiers of this country were frequently ravaged by a murderous enemy. The occasion was to form a firm and permanent barrier to the incursions of this savage enemy; and the object was to secure to them and to their posterity, a convenient town, where they could in the time of peace, enjoy the good fellowship of society, and the mutual interchanges of commerce with each other.

That the government of *Great Britain* stood pledged to the inhabitants of this town, to secure to them these advantages, together with freedom and religious liberty; and no doubt can be entertained, that these advantages and blessings would have been perpetuated to them and their posterity, if the government of this country had still remained under that government. The revolution in *America*, and establishment of independence, made a new æra, and changed the powers of government from the crown of *Great Britain*, to the freemen of *America;* and shall they be less mindful of these important rights, than the *British* would have been? He hoped and trusted they would not; and that the good sense and justice of the country would uphold and establish those rights, against all the speculators in the world who would endeavour to deprive the inhabitants of them.

Mr. *D. Hall.* The moment the royal faith was pledged to the *Germans*, for the reservation of this town for their use, it was tantamount to a warrant of survey for vacant lands. When it was run out by the surveyor-general, it

Devisees of Hawkins v. Arthur and others.

was similar to a return of the surveyor-general into the secretary's office; and when it was returned to the governor and council, and entered in the council books and confirmed on their part on behalf of the crown, it was as solemn a transfer of the right of the crown to the inhabitants of the town, as a grant under the great seal of *Great Britain*. Consequently, any grant for the same lands afterwards, was null and void; as much so, as a junior grant for the same lands would have been, if they had been granted to a private individual. There was one circumstance, he said, which had not been accounted for in this transaction, which had made an impression on his mind, and that was, that the land in *Job Marion's* grant, was stated to be situated on *Santee river*. Whereas, this land was on the *Congaree river*, at least thirty miles above the junction of the *two rivers*; which conveyed to him the idea, of a misrepresentation in the location of the land, which was a strong badge of fraud, and was of itself alone sufficient to render it a very suspicious transaction in the origin.

Bay, J. in charging the jury told them, it was necessary for them to determine whether there ever was this reservation for the town of *Saxagotha* by the crown of *Great Britain*, or not? If so, then the inhabitants of *Saxagotha* township, for whose use and benefit it was reserved, were most unquestionably entitled to it; and that there was this reservation most evidently appeared by the plat produced, which had every appearance of authenticity attached to it. In the first place, there must have been an order of council made to have this town surveyed and laid out, otherwise the surveyor-general would never have proceeded to make it. In the next place, it appears from the face of the plat as well as from the testimony of the two surveyors, that this town must have been actually run out by metes and bounds by the surveyor-general, as directed by the governor and council. Again, the uses and purposes for which it was surveyed and laid off, is most evident from the lots

laid down on the plat, and the streets and squares laid off for public purposes. All which was confirmed by the return of the original plan to the governor and council, and the entry or record thereof in the council books, which appears to have completed this reservation. And this again is further confirmed by the building of two churches on the spot delineated on the plat, for that purpose, and the grants of the town lots annexed to the farms or plantations throughout the township. All these circumstances combined, formed such a mass of testimony in favour of this reservation, that the mind of man could not get over it. As to the legal effect of this reservation, there could be no question about it. It amounted to a covenant in law, between the crown and the people, for whose use and benefit it was intended; that the land contained within the boundaries of that plat, should for ever thereafter be appropriated and disposed of, for the use and benefit of the inhabitants of the said town and township, and their heirs for ever, and to and for no other intent and purpose whatsoever.

It was as solemn an act on the part of the government, as any grant could be under the great seal of the province; and any grant for the same lands afterwards must have been obtained by fraud or misrepresentation, and therefore null and void to all intents and purposes, as much as any junior grant obtained for land which had been formerly granted.

It appeared to him, that the king of *Great Britain* became a trustee for the use of the said inhabitants, as soon as the reservation was completed, until the whole of the lots were granted away among the said inhabitants and their descendants, and so remained till the revolution was accomplished; when the state of *South Carolina* succeeded to the trust, and now holds in trust all the ungranted lots and common, for the use of the inhabitants of the said town and township; and that no other appropriation can be made of said land, but for the use of the said inhabitants, agreeable to

Devisees of Hawkins v. Arthur and others.

the true intent and meaning of the crown and people, when the said reservation was originally made.

The jury retired, and after remaining in their room a short time, returned a verdict for the defendants.

A notice of a motion for a new trial was then given by the plaintiffs' counsel, but it never was afterwards brought forward. They acquiesced in the verdict, and abandoned their claim.

Charleston District, 1798.

NATHANIEL BLISS NEAL *against* PHILIP LEWIS.

In a declaration for slander, where there are some counts good and others bad, a general verdict or finding will support the good counts. A man may insert as many counts as he pleases, and if any one is good, it is sufficient. Unless damages are very outrageous, court will not grant a new trial in slander.

SLANDER. Verdict for plaintiff. Motion in arrest of judgment.

The declaration in this case contained several counts:

1. For calling the plaintiff a rascal, a scoundrel, a liar and villain.

2. For calling him a damned swindler.

3. For calling him rascal, thief and scoundrel.

4. For repeating that plaintiff's bills had been protested in *England*, and that he was unworthy of credit.

After a very long trial, and a great deal of testimony on both sides, the jury found a general verdict against the defendant, with 3,000 dollars damages, without distinguishing on which of the counts in the declaration they founded their verdict.

This was, therefore, a motion in the first place in arrest of judgment; or, if the court should not think proper to grant that motion, then for a new trial.

In support of the motion in arrest of judgment, it was contended, that this declaration contained several distinct

counts, separate and independent of each other, some of which were actionable, and the others not actionable; and as the jury have found a general verdict on the whole, without distinguishing on which their verdict for such large damages was founded, whether on the counts that are actionable or not, the verdict was void in law for uncertainty. That any judgment entered up on such a verdict would be erroneous, as peradventure it might be on the counts which were not in themselves actionable. It would, therefore, be a kind of hazarding cast to find out on which of them the defendant had been found guilty; and no person, from the perusal of the record, could tell what was really the law in regard to actionable words or not. It would appear to be so vague and indefinite, that there could be no coming at any thing like certainty from it; or, for aught that appeared, the jury might have given 500 dollars on the first count, 1,000 on the second, 500 again on the third, and, lastly, 1,000 on the fourth and last count; so that, in reality, they might have taken upon them to say that every count in the declaration was actionable, against every principle of law upon that subject. If, however, the court should be of opinion that the above grounds were not sufficient in law to arrest the judgment, the counsel for the defendant urged, that his client was well entitled to a new trial. First, for excessive damages, beyond all proportion to any injury the plaintiff could have sustained by occasion of speaking any of the words charged; and also because the judge who tried the case had not clearly distinguished to the jury, and explained to them the nature of the counts, and pointed out those which were actionable, and those which were not so; when it was highly presumable if he had done so, the jury might have been induced to find very small damages, if any at all, for the plaintiff; but by suffering them all to go to the jury, they went with accumulated weight against defendant, which may have induced them to give such outrageous damages. Whereas, should the court now send it back to another jury, to whom these necessary explanations might be

Neal v. Lewis.

made, a reasonable or moderate verdict might be obtained, even if the defendant should not be acquitted of the slanderous charge. Another ground in favour of the new trial was taken in the argument, which was, that improper testimony had been permitted to go to the jury. Mr. *Adam Tunno*, a witness sworn in the cause, was allowed to give evidence of the contents of letters he had received in the way of business from the plaintiff's father, who was a merchant in *London*, mentioning letters he had received from *Lewis*, the defendant, from *Charleston*, very injurious to his son's reputation and credit as a merchant, and requesting him to make the necessary inquiries about the matter, for his, the father's, information and satisfaction; which, it was alleged, was suffering parol evidence to be given of the contents of letters in the hands of a third person.

The counsel for the plaintiff were about to proceed in reply, but were stopped by

The Court. They observed, that although the jury might have taken upon them the knowledge of the law, and distinguished in their verdict on which of the counts in the declaration they found the defendant guilty of slander, yet they appear to have taken a safer course, by finding a general verdict, which is sufficient in law, if any one of the counts in the declaration is good. They compared it to an indictment which contained a number of counts, some good, others irrelevant; a general verdict or finding will support the good ones. So in pleadings in civil suits or actions, where there are various counts in a declaration, if any one of them is good, a general verdict will support that count. And indeed it was for this very reason that the law allows a man to insert as many counts in his declaration as he pleases, in order that if one or more fail, the others may bear him out, if the evidence is sufficient to support such count or counts. On this ground, therefore, the court saw no reason to arrest this judgment.

See the case of *Newbiggin v. Pillans and Wife*, *ante*, p. 162.

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With respect to the motion for a new trial, the damages did not, upon due consideration, appear to be so outrageous as defendant represented. The parties were both merchants in this city, and depended much upon their credit, both at home and abroad, for their prosperity and success in life. Any thing, therefore, which went to destroy either the credit or reputation of such a man, was an evil of a very serious nature. Swindling, mentioned in the second count, is a *crimen falsi*, an offence which, if true, would render a man infamous. *Theft*, mentioned in the third count, is *a felony*, which, when committed under some circumstances, would affect a man's life; and saying of a merchant that he is a bankrupt, or words to that effect; that his bills were protested, or that he was unworthy of credit, mentioned in the last count, has a tendency to ruin the reputation of a mercantile man. All these injuries appear to have been offered or committed against the plaintiff in this action by the defendant. Shall this court, therefore, take upon themselves to say, that 3,000 dollars for such gross slanders were unreasonable or outrageous damages? They have no such power. It was for the jury to determine upon that point, and they have done so. The court, therefore, sees no ground to order a new trial on that account. As to the evidence offered by Mr. *Tunno*, of the contents of a mercantile letter in the way of trade, it is every day's practice to allow it, and without it commerce could not be carried on, or good faith supported or maintained with merchants abroad, and the letter in question appears to have been one of that kind.

The rule for new trial was discharged.

Present, BURKE, GRIMKE, WATIES and BAY.

Charleston District, 1798.

THOMAS OSBORNE, Sheriff of *Charleston* district, *against* JOHN BOWMAN.

Where a bond is given for remaining within prison bounds, and defendant goes without the limits, and plaintiff afterwards sues out a second execution for an escape, and imprisons his person, it shall exonerate the security to the bond given to the sheriff. For although where a man has two remedies he may pursue either at his option, yet he shall have but one satisfaction, and the imprisonment of a man's person is the highest satisfaction known in law.

DEBT on bond. Judgment by default. Motion to have the judgment set aside.

This was an action on a bond given by the defendant, under the prison bounds act, as security for Mr. *Kennedy*, who had been taken on a *ca. sa.* It was alleged by Mr. *Taylor*, plaintiff's attorney in the action, that the defendant in the original suit had gone without the prison bounds, whereupon he moved the court for leave to issue a second execution for an escape, upon which he was taken and confined.

Mr. *Taylor*, at the same time, commenced this action upon the bond given to the sheriff for Mr. *Kennedy's* not going beyond the prison bounds, and obtained judgment by default upon it.

This was, therefore, a motion to set aside the judgment and proceedings, on the ground of irregularity.

The *Attorney-General*, in support of this motion, argued, that however the defendant, Mr. *Bowman*, might have been liable in the first instance, on Mr. *Kennedy's* going without the prison rules or limits, yet as the plaintiff in the original suit had thought proper to pursue another remedy against his debtor, by taking out a second execution for an escape, on which the defendant had been arrested and was in custody, it amounted to a discharge of Mr. *Bowman* on this bond, as it was inconsistent with the rules of law that a man should have a double satisfaction for the same debt. That the person of a man was the highest satisfaction a creditor could have against his debtor, and this the plaintiff in that

Osborne v. Bowman.

action had obtained. He had made his election, and proceeded on the second execution, and retaken the defendant on it. He therefore waived his right of action against Mr. *Bowman*, on his bond under the prison bounds act. He said it was analogous to special bail, where defendant is taken on a *ca. sa.* in which case it is clear that the special bail is exonerated from his responsibility. 1 *Cromp.* 336. 2 *Cromp.* 71.

See the case of *Porteous* v. *Snipes*, *Bay's Rep.* vol. 1. p. 215. *Riley's* edit.

Mr. *Marshall*, against the motion, insisted, that the plaintiff in the action had not lost his remedy by suing out his second *ca. sa.*; that where a man has a double remedy, he may pursue either, or both, at the same time, as in the case of a bond and mortgage; he may proceed in equity to foreclose the mortgage, or sue on the bond at common law, or he may proceed on both at the same time, at his option.

Per Curiam. There is no doubt but a man may, where he has a double remedy, pursue either or both at the same time, but he can have but one satisfaction. The person of a debtor is the highest satisfaction a creditor can have in law. When a plaintiff once takes out his *ca. sa.* and imprisons the defendant, it is a satisfaction of the debt, and discharges his bail. Hence the privilege which the bail have of surrendering up the defendant in their own discharge.

The case of *Porteous* v. *Snipes*, quoted, was strong in point. There the plaintiff had his judgment against *Washington*, who went into equity, and obtained an injunction. *Snipes* was *Washington's* security on the injunction bond. Upon the hearing of the cause, the bill was dismissed, and the injunction dissolved. The plaintiff *Porteous*, then had his choice of two remedies; either to take out his execution against the defendant *Washington*, or against *Snipes*, on the injunction bond, who became liable on the dissolution of the injunction. He accordingly made his election, and took out

Osborne v. Bowman.

a *ca. sa.* against the defendant, who died in gaol. Afterwards he brought a suit against *Snipes* on the bond; the satisfaction on the part of *Washington* was pleaded in bar to the action, and the court sustained the plea, on the ground that the taking out the *ca. sa.* and imprisoning the defendant, was the highest satisfaction known in law.

Let the judgment and proceedings be set aside.

Present, BURKE, GRIMKE and BAY.

CASES

ARGUED AND DETERMINED

IN THE

CONSTITUTIONAL COURT OF APPEALS,

OF THE

STATE OF SOUTH CAROLINA.

IN THE YEAR 1799.

MATHEW COLLINS *against* ELIZABETH WESTBURY and BURWELL BROWN.

Columbia, April, 1799.

DEBT on bond. Plea, *duress.*

It appeared that the plaintiff in this action had some claim against the defendants, which they refused to admit of or pay, as an unjust demand; and he did not think proper to bring any action against them, till they were on their way removing to *Georgia*, with their families, negroes, and other property. While they were thus *in transitu*, actually on the road, a considerable distance from their former residence, the plaintiff sued out an attachment against them, and seized their negroes for this supposed demand. In this embarrassing situation they knew not what to do, being in the utmost distress, at a distance from their former friends,

Distress of goods or negroes, is a *good plea* to a bond given to procure *their release,* under hard & pressing circumstances, which are very proper for the consideration of a jury. A demurrer to such a plea overruled, and a *respondeat ouster* awarded.

Collins v. Westbury and Brown.

among strangers; and to proceed without their negroes, would have been leaving themselves without the means of support. While in this distressing dilemma, the plaintiff himself proposed a compromise of this old demand; which sad necessity at last, *and as the only means left for getting back their negroes*, they consented to, and gave the bond on which the present suit was brought.

To this plea there was a demurrer, and the cause shewn was, that *duress of goods* would not bar the plaintiff of his right of action on the bond, even if it had been given to obtain the release of the negroes.

In support of the demurrer, it was urged on behalf of the plaintiff, that he had done no one act but what was agreeable to law. He had a demand, which he conceived to be a just one, against the defendants, and he had pursued the legal means pointed out by law for recovery of it. That defendants had thought proper to compromise this demand, and gave this bond for it. There was no compulsion, threats or force made use of on the occasion; it was voluntarily given. But, even admitting he had forcibly, or even fraudulently, got possession of the negroes, which were attached; the law had provided remedies for such injuries, trespass, trover or detinue would have lain for them, and to such legal action the defendants should have had recourse. That *duress of goods or chattels alone* will never be a good plea against a bond or other solemn contract entered into for the payment of money.

2 *Just.* 483. 1 *Black.* 131.

To this it was answered, that a man's necessities might be so great, and circumstances might so combine and press upon him, as to oblige him to do an act, which he never would have consented to, unless compelled by such urgent and peculiar incidents, as left him no other alternative to get back his goods, but by signing such a bond as the present one; and therefore, the law would allow him the privilege of avoiding a bond given under such circumstan-

ces, as an unreasonable and unwarrantable exaction, so as to place the parties in their original situation with respect to each other. Even moneys paid under similar circumstances, may be recovered back from the party unreasonably exacting it. And what made the circumstances of this case hard and rigid in the extreme, was, that no attempt was ever made for the recovery of this demand, while the defendants were surrounded by their friends, and in a situation to defend themselves; but when on their journey, and at a distance from all their friends, this hard and severe measure was taken, to seize the property, and to compel them to give the bond in question. There was not the smallest pretext of their going off privately, or with a view of defrauding creditors; they went off in the face and presence of all their old neighbours, and their designs and intentions of removing had been known for a long time before their departure.

Collins v. Westbury and Brown.

2 *Str.* 916.

Per Curiam. So cautiously does the law watch over all contracts, that it will not permit any to be binding but such as are made by persons perfectly free, and at full liberty to make or *refuse such contracts*, and that not only with respect *to their persons*, but in regard to their *goods and chattels also*. Contracts to be binding must not be made under any restraint or fear of their persons, otherwise they are void, as in the case of *Evans* v. *Huey and Franklin*, vol. 1. p. 13. (*Riley's* edit.) where a note was deemed void, both as to principal and his security, where a party of armed men, in quest of horse thieves, called at a man's house in the night, and *Evans*, one of the party, demanded of the man of the house, a settlement or satisfaction for an injury he had sustained some time before, in a quarrel; and the defendant *Huey*, in order to compromise the matter, gave his note for 28*l.* sterling, and the next morning got *Franklin* his neighbour to be his security. In that case, *it was deemed duress;* because, an armed party going to his house in the night time, and one of them demanding a settlement for a former in-

Collins v. Westbury and Brown.

jury, was calculated to alarm a man's fears, although no threats were made use of. This to be sure was only a *Nisi Prius* case. But it has been a leading case on the subject, and admitted as the law of *duress*, ever since. See also, 2 *Powell on Contracts*, 159. So in like manner, duress of goods will avoid a contract, where an unjust and unreasonable advantage is taken of a man's necessities, by getting his goods into his possession, and there is no other *speedy means left*, of getting them *back again*, but by giving a *note or a bond*, or where a man's necessities may be so great as not to admit of the ordinary process of law, to afford him relief, as was determined in this court after solemn argument, in the case of *Sasportas* v. *Jennings and Woodrop*, vol. 1. p. 470. (*Riley's* edit.) also in the case of *Ashley* v. *Reynolds*, 2 *Str.* 916. In the case under consideration, the facts are admitted by the demurrer that the negroes were seized by the plaintiff under and by virtue of this attachment, and that this bond was given to procure their release, at a time when the defendant could not wait the slow progress of law, to obtain redress. It is very clear, therefore, that the plea of *duress*, was a good plea; and the whole of the circumstances ought to have gone to the jury. Judgment was therefore given for defendant in demurrer, and a *respondeat ouster* awarded.

Present, BURKE, WATIES and BAY.

The STATE *against* DOCTOR JAMES.

Columbia, April, 1799.

UPON an indictment for a misdemeanor.

This was an indictment at *Orangeburgh*, for branding a negro with a hot iron, contrary to the form of the act of the legislature, in such case made and provided, which inflicted a fine of 100*l.* for such an offence.

The defendant was convicted on very clear testimony, upon the plea of not guilty pleaded, and upon being called up by the court to receive sentence, notice of a motion in arrest of judgment was given; whereupon, he was ordered up to *Columbia*, and security taken for his appearance before the judges, at their then next meeting in the constitutional court of appeals at *Columbia*, there to wait and abide the final decision of his case before that court.

All fines and forfeitures imposed by any act of the legislature of this state, must be prosecuted or sued for within six months after they are incurred, and not after; and if not sued for or prosecuted within the above time, it may be taken advantage of, by motion in arrest of judgment as well as by a plea in bar to the action or prosecution.

The motion in arrest of judgment was accordingly brought forward in the court of appeals agreeable to the notice; when it was urged, that the defendant ought to be discharged from this prosecution, as it was for a heavy fine under an act of the state, and the prosecution was not commenced until after the expiration of six months next after the offence was committed, conformable to the act of 1748; and the case of *The State* v. *Dr. Fraser*, was relied on as in point upon the subject; and what was good cause in bar of the prosecution, was good cause in arrest of judgment.

See case of Dr. *Fraser*, *ante*, p. 96.

To this it was replied, by Mr. Solicitor *Colcock*, that the act of 1748 ought to have been pleaded in bar to the prosecution, and that it was now too late to take advantage of it, after a conviction upon the plea of not guilty pleaded. That in the case of Dr. *Fraser*, the act was specially pleaded, and the court gave judgment upon the plea.

The State v. James.

The ground for arresting a judgment must be such, as would have been good *on demurrer* or *plea in abatement.*

Sed per Curiam. It is a general rule with regard to arrests of judgment upon matter of law, *that whatever is alleged in arrest of judgment, must be such matter as would upon a demurrer or plea in bar, be sufficient to overturn or destroy the action.* 1 *Cromp.* 327. And the rule is the same both in civil and criminal cases.

Now there is no doubt, but the act of 1748 would have been a good plea in bar to this prosecution, if it had been pleaded; for it expressly declares, that in all and every case, where any *penalty, fine,* or *forfeiture* hath been, or *shall be* inflicted, or imposed by any act of assembly, the time for prosecuting such offenders shall be limited to six months after the time of the offence committed, or penalty incurred, and not afterwards. If, then, this act would have been a good plea in bar, and would have destroyed the prosecution *in limine,* there can be no doubt but it is good cause to arrest the judgment, as the cause of action, or rather prosecution, was gone in law after the expiration of six months, and it was admitted, that this prosecution was not commenced until long after that time. The pleading issuably, or denying the facts and going into the merits of this case, which might have been in the defendant's favour, does not in a criminal case, deprive him of this advantage of the arrest of judgment.

Let the judgment be therefore arrested.

Present, BURKE, WATIES and BAY.

EDWARDS *against* THAYER.

Charleston District, 1799.

ASSUMPSIT on five notes of hand, for 50*l.* each, against defendant as indorsor of *Moses Sarcedus*, who had lately become a bankrupt.

The defence set up, was want of due notice on the part of the holder that the notes had not been duly paid off. It appeared in evidence, that the drawer had become insolvent, after the drawing and indorsing of these notes; and that the holder had omitted to protest them for non-payment, or to give the defendant notice thereof; whereupon, the jury, under the direction of the judge who tried the cause, found a verdict for the defendant.

Indorsee of a promissory note is bound to use due diligence to get the money from the maker of it, and if he fails in payment, then he is bound in all cases to give due notice thereof to the indorsor before he can maintain an action against him.

A motion for a new trial was made to the court of appeals, on the ground of misdirection.

A constructive notice arising from the insolvency or supposed insolvency of the maker of the note, is not sufficient; actual notice should be given agreeable to the rules of mercantile law.

Mr. *Holmes*, in support of the motion, contended, that this case formed an exception out of the general rule of mercantile law, respecting notice and due diligence. That a protest or formal notice to the indorsor was unnecessary in this case, as it was notorious to all the world, that *Sarcedus* had become a bankrupt, and therefore it would have been a work of supererogation, to have notified him of what every body knew before, and the defendant himself must have known it.

To this it was answered, by defendant's counsel, that the law of merchants made no such exception out of the general rule, as the one contended for. Every indorsee or holder of a note, is bound to use due diligence to obtain his money from the drawer of the note; and if he fails, to give *due notice thereof to the indorsor*. This is the condition upon which every indorsement is made, and imposes this obliga-

Cunn. on Bills, 62.

Edwards v. Thayer.

tion on the indorsee, which if he fails to perform, he loses his money. He has himself to blame for his *laches*. It would be a most dangerous thing to commerce, if rumour or reports, or the common fame of the day were to be substituted as notice of non-payment by the drawer of a bill of exchange or promissory note, instead of a protest, or other good and legal notice of such failure; for which reason the law requires positive, not such implied notice, and for this good reason, because the indorsor may have funds in his hands, which he might otherwise be induced to part with; or the means of indemnification within his reach, which he might otherwise neglect to make use of upon vague reports, but which certain information would justify him in detaining, or pursuing.

Per Curiam. The plaintiff in this case seems to rely upon common fame or report as a sufficient justification for not protesting the notes in question, or giving due notice of non-payment by the drawer. In order to form a correct idea of this case, it is necessary to consider the true nature of an indorsor on a note of hand. As long as a note of hand remains unindorsed, it has no similitude to a bill of exchange; but when it is indorsed, its resemblance begins, and it is then governed by the same rules. It then becomes *an order by the indorsor*, on the *maker of the note*, to pay *the indorsee* the contents. The indorsor, from that moment, becomes the drawer. The maker of the note *is in nature of an acceptor*, and the *indorsee* is *the person to whom it is made payable*. The indorsor, therefore, only undertakes in case the maker of the note does not pay. The indorsee, therefore, is bound to apply to the maker of the note. He takes it upon this condition, and therefore in all cases must resort to him. He must know *who he is*, and *where he lives;* and if, after the note becomes payable, *he is guilty of neglect*, and the maker becomes insolvent, he loses his money, and cannot come upon the indorsor. 2 *Burr.* 676. Therefore, before the indorsee of a promissory note brings an action against the indorsor, he *must shew a demand*, or

Edwards v. Thayer.

due diligence to get the money from the *maker of the note;* just as the person to whom a bill of exchange is payable, must shew a demand, or due diligence to get the money from the acceptor, before he brings his action against the drawer; so that the rule is exactly the same upon promissory notes as it is upon bills of exchange. In the case under consideration, it does not appear that any diligence was used at all to get the money from *Sarcedas*, the maker of these notes, after they were due, or any notice of non-payment ever given to the indorsor; so that none of the requisites of the law have been complied with on the present occasion. We are all, therefore, of opinion, that no suit can be maintained on these notes against the indorsor, *as plaintiff is bound to prove* a demand or due diligence to get the money from the maker of the notes, and *due notice* thereof to the indorsor. A constructive notice arising from insolvency, or supposed insolvency, is by no means sufficient to charge the indorsor. Actual notice should have been given and proved, agreeable to the mercantile usage and custom.

New trial refused, and rule discharged.

Present, BURKE, GRIMKE, WATIES and BAY.

Charleston District, 1799.

CROSS and CRAWLEY *against* SHUTLIFFE and AUSTIN.

In the construction of policies of insurance, the *intent and meaning* of the parties are to be regarded more than the *strict letter*. Not touching at a port in the course of a voyage, where a vessel has a privilege to call at, is no deviation within the meaning of the policy, because it is a privilege intended for the benefit of the insured, which he may waive for the general interest of all concerned, if he pleases.

CASE on a policy of insurance.

The vessel in this case was insured on a voyage from *Charleston* to the *Cape de Verd Islands*, and from thence to the coast of *Africa*, at the rate of eight per cent. for six months, and one per cent. a month after that time, during her stay on the coast. Instead of going to the *Cape de Verd Islands*, the vessel proceeded directly to the coast of *Africa*, the point of her ultimate destination, at once, and arrived in safety, where she lay four months, during which time her bottom was eaten out with worms, in consequence of which she was condemned as unfit for sea.

The jury, under the direction of the presiding judge, found a verdict for the plaintiffs, to the amount of their demand.

This was a motion for a new trial, on the ground of misdirection.

Mr. *Desaussure*, for the underwriters, and in support of this motion, stated, that the ground upon which he meant to rest his case, was *deviation in the course of the voyage*. This, he said, was a very important principle in mercantile law, and ought to be well understood and settled in our courts of justice. For if it was once admitted that a ship or vessel which was insured to one port or place, or on a certain specified voyage from port to port, &c. had a right to go to any other port or place, or on any other voyage than the one specifically mentioned in the policy of insurance, wherever the master or owners might choose, it would place all the underwriters in the world at the mercy of the insured or their agents, and would render all commerce uncertain, as no insurer could tell where such vessel might go, or what risks he had to insure against. It was, therefore, of great moment to commerce, that this principle should be fixed and

Cross and Crawley v. Shutliffe and Austin.

well ascertained, that men might not be entrapped or unwarily drawn into contracts they could not see the consequences of. That all the writers upon the doctrine of insurance were agreed upon this point, namely, that if a ship or vessel deviates from the course of the voyage insured upon, the underwriters were discharged. In the case under consideration, he said, the vessel was insured to go *to the Cape de Verd Islands*, and from thence to the coast of *Africa;* whereas, *she did not go to the Cape de Verd Islands*, but proceeded directly to the coast, which was not the voyage mentioned in the policy, but another one. It was no matter whether the risk was increased or diminished by the deviation; that was not in this case the grand question, but whether there was actually a *deviation or not?* And although in a particular case, it might possibly happen that the risk was lessened by it; yet, in establishing such a principle, it would be ruinous nineteen times out of twenty; and in support of his positions, he quoted *Park*, 294, 295. 298. *Durnf. & East*, 592. *West.* 574. the principles of all which cases, he said, fully confirmed the doctrine he had laid down.

The *Attorney-General*, for plaintiffs, in reply, admitted that all the principles laid down by the defendants' counsel, and the cases quoted, were good law; but denied the application of them in the present case. He did not mean to contend that a deviation from the true course of a voyage, as a general principle, ought to be allowed. But there were cases, he said, where it was very much for the advantage of all the parties concerned; and where no exception could, or ought to be taken to it; and the present was a remarkable one of this kind. He said, that it should be remarked in this case, that touching at the *Cape de Verd Islands*, was a privilege intended to be given by the underwriters to the insured, for the purpose of procuring refreshments and provisions before the vessel proceeded to the coast, if necessary. That this was an indulgence usually given to ships and ves-

Cross and Crawley v. Shirtliffe and Austin.

sels in that trade, and was no further obligatory than the necessities of the ship and crew required. This privilege was only auxiliary to the voyage, and was no essential part of it, which every man acquainted with trade of that part of the world, was perfectly conusant of. But if the vessel did not stand in need of those supplies or refreshments which were usually procured at those islands, where, he asked, was the necessity of going there? None. It would only have unnecessarily protracted the voyage, and consequently increased the risks the insurers were to run; besides, beating up to the *Cape de Verds* at that season of the year, would have required at least thirty days; so that independent of the wear and tear of the ship, that difference of time in the voyage would have been inevitable; whereas, by bearing away before the wind for the coast, the voyage was shortened, the risk lessened, and the vessel arrived in safety at her port of destination, in the river *Gambia* on the coast of *Africa*. This case, therefore, he contended, clearly proved the position he had laid down, and took this case entirely out of the rule of deviation. Indeed so far from it, that she pursued the best, and most direct course possible to the place of ultimate destination; and instead of going round the bow, she had gone along the line or string to the direct point, at the end of it; and by that means arrived thirty days at least sooner at her destined port, than she would have done had she gone to the *Cape de Verd Islands*.

These kind of clauses, giving liberty to touch at certain places in the course of a voyage, agreeable to the usage of trade, is very common in policies of insurance; but they are always considered as *subordinate to the voyage insured*; which is the principal object of the contract, and not as obligatory, unless the insured choose to make use of the indulgence. The great object of the voyage should be kept constantly in view, 1 *Marshall*, 398. and if this is accomplished, the underwriters surely ought not to complain. Besides, it was evident, that the loss on the present occasion was not owing to any thing that happened in the course

of the voyage on the high seas, but owing to worms which eat out her bottom while in port in the river *Gambia*, after her outward voyage was completed.

Cross and Crawley v. Shutliffe and Austin.

Per Curiam. In the construction of policies of insurance, the intent and meaning of the parties are to be regarded, more than the strict and *literal sense of the words*. They are to be construed largely, for the benefit of the insured, and the advancement of commerce; and in this construction, the usage of trade on particular voyages ought always to be taken into consideration. In the wording of the policy under consideration, the vessel was to proceed on a voyage from *Charleston* to the *Cape de Verd Islands* and from thence to the *coast of Africa*, the ultimate point of destination. But the intent and meaning of all the parties must have been, that this vessel was insured on a voyage to the coast of *Africa*, *with liberty to touch at the Cape de Verd Islands*; and the usage of trade in that part of the world will warrant this construction; for it is well known, that it is usual and customary for vessels trading to the coast of *Africa*, and to the southern parts of the eastern world, to call at those islands for water, provisions and refreshments which are not elsewhere, on or near that coast, to be procured, but are there in abundance; and if there had been no clause in the policy for that purpose, it would have justified the captain in calling there for those supplies if he had wanted them, under the sanction of this usage. The clause in this policy, therefore, only gave in express words, a permission to touch at the *Cape de Verds*, which the course of trade in that quarter of the world would have warranted without it. Under these circumstances, therefore, it appears to the court, that the true intent and meaning of this policy was, that the vessel should sail on a voyage from *Charleston* to the coast of *Africa*, with liberty to touch at those islands, *should it be necessary in the course of the voyage*. If, then, this is the true construction which should be given to this policy, it ought to be regarded as a privilege

Park, 30.

Cross and Crawley v. Shutliffe and Austin.

or indulgence, and not as an obligation; that is, if the situation of the crew and ship was such in the course of the voyage, as to make it necessary to put in there for necessaries, the captain was at liberty so to do; but if not, then it was his duty to make the best of his way to the end of his voyage, which he did. We are all, therefore, of opinion, there was no deviation from the true course of the voyage, but on the contrary, a direct sailing to her destined port, agreeable to the intent and meaning of the policy, with as little delay as possible.

Let the rule for a new trial be discharged.

Present, BURKE, GRIMKE, WATIES and BAY.

Charleston District, 1799.

L. C. A. SCHEPLER *against* FREDERICK GARRISCAN and WILLIAM CARPIOIN.

A consignee of a ship and carg has a qualified property in the same, and a constructive possession in law the moment she comes into port; for from that moment she is under his power and direction

The sheriff has therefore no right under the attachment act to take such vessel and cargo into his possession, but should serve copies of the attachment on the consignee, who has a lien on the whole in the first place, for his just demands as a creditor in possession.

CASE on attachment.

The sheriff of *Charleston* district, by virtue of this attachment, seized the ship *Sophia*, in *Charleston* harbour, as the property of the absent debtors, the defendants, which had been consigned to Mr. *John Potter*, a merchant in this city, with a cargo on board, of considerable value. This was therefore a motion for the sheriff to restore the possession of the ship to Mr. *Potter* the consignee, and to the master who was part owner of the vessel.

In support of this motion, the affidavit of *Thomas Stewart* (who was Mr. *Potter's* agent, he being then absent from *Charleston*) was read, by which it appeared that the property of the ship *Sophia* was in *Carpioin*, one of the absent

debtors, and the master *Jacob Jansen;* and not in *Garriscan and Carpioin*, against whom the plaintiff had the demand. It was not intended by this motion, that the right of property in the ship should be tried, or called in question here; only that the ship should be placed in the hands of the consignee, who by the law of merchants had the legal custody of her and the cargo, while in port, as representing the true owners whoever they might be, until that question, if it should be made one, could be determined; or at least, until the cargo on board could be unloaded and disposed of, agreeable to the orders and instructions Mr. *Potter* had received from the consignors, and that copies of the attachment might be served on Mr. *Potter's* agent, and the captain *Jacob Jansen*, calling upon them to come in and declare on oath, what property they had in their possession, power or custody belonging to the absent debtors, agreeable to the terms of the attachment act.

The same grounds in support of this motion were urged, which had been taken on a similar motion, before the judges, at chambers, in *September*, 1798, in the case of *Noel* v. *Dubrie*, and *Gaillard and others* v. *Dubrie*, where a ship had been attached and taken possession of by the sheriff, in the same manner as in the present case; and after argument, had been ordered to be delivered up to the consignees.

On the part of the plaintiff in attachment, it was contended, that the property of the ship was unquestionably in the absent debtors; and that *Jansen's* claim, or pretended claim, was only colourable, and that the plaintiff was ready to shew it. That the consignee was only entitled to the possession of the ship, upon his coming in and giving security for the debt; in which case he might dissolve the attachment as in other cases; but until that was done, the ship ought to remain in the custody of the sheriff, until sold for the payment of the plaintiff's demand. That the act

Schepler v. Garriscan and Carpioin.

had given the plaintiff a lien on the ship for his debt, which by the service of this attachment, and until payment or security given agreeable to the act, he could not be compelled to give it up. That this was a speedy and summary mode of redress given to creditors against absent debtors by the attachment act, which this court would not readily be inclined to deprive the party of.

In reply, it was said, that the consignee of a ship or vessel, had by law a prior lien to any attaching creditor whatever; for by the act of consignment, he had a qualified property in the ship and cargo, until his commissions, disbursements, and all advances were paid off, and fully discharged; and like a creditor in possession of property, he had a right to detain, in order to pay himself in the first place. That to affect the right of conveyances by giving the construction contended for, to the attachment act, might prove very injurious to trade and commerce in general, especially in a country where such extensive credits were given, as in *America*, by taking funds out of the channels of trade, contemplated by the parties, and appropriating them to other purposes than merchants in foreign countries intended. That it was well known, that merchants were in the habit of making large pecuniary advances, accepting bills, making insurances, and doing various other acts, upon the credit of consignments, all which would be materially affected, if a dormant creditor could step in between consignor and consignee, and cut the latter off from remittances, so essentially necessary for the benefit of trade and commerce. Therefore it was, that the mercantile law had always highly favoured and protected the rights of consignees, in all commercial countries. That the attachment act would not warrant the sheriff in taking possession of the goods of an absent debtor, where there was any one, in the fair and *bona fide* possession of them; and that it was his duty in all cases, to serve copies of the writ of attachment on such persons so in possession, with notice thereon endorsed, to appear and shew cause, why such property in their possession

(supposed to belong to the absent debtor) should not be considered as the absent debtor's property; in which case, all the fair claims of the party in possession, could be legally investigated and determined. In the present case, for instance, captain *Jansen* had a claim to a part of the ship *Sophia*, attached; this was denied by the plaintiff in attachment, and the point could not be determined in this short handed way, upon a motion to restore the property taken from the consignee, which shews the good policy of the attachment act, in calling on parties in possession, to come in and shew cause, in the first instance on oath, why the property should not be considered as the absent debtor's; and if the plaintiff is not then contented with such return on the oath of the party, he may try the point before a jury of the country.

Per Curiam. This point has already been determined in a former case, by a meeting of the judges at chambers, on a motion similar to the one now before the court. But as that determination has not been considered as binding on this court, it is now brought forward again for our consideration. In the case alluded to, a ship and cargo attached by the sheriff, was, after full argument, ordered to be restored to the possession of the consignee. This opinion, we now think was a correct one, and determined upon sound mercantile principles. A consignee of a ship and cargo, has in contemplation of law, a qualified property in the same, and a constructive possession the moment she comes into port: from that moment, the consignee has the direction and management of her, for the benefit of all concerned: she is under his power and government, and subject to his orders, and he may therefore be very well considered in law, as in possession of the whole property. From this view of the subject, therefore, the sheriff has no right under the attachment act, to seize and take possession of the ship and cargo, as wholly belonging to the absent debtors. He should have served copies of the attachment

Schepler v. Garrigan and Carpiain.

on the cognizee, who alone was capable of making a true and proper return, not only of the vessel itself, but of all the cargo on board of her, and to shew to whom the same really belonged. To give a contrary construction might prove extremely injurious to commerce, which ought ever to be highly protected; as a creditor might otherwise, for a debt of 100*l.* devest and take away from its proper commercial channel, a ship and cargo worth 10,000*l.* and keep the whole in his possession, until a lengthy investigation could take place, in order to come at the absent debtor's property. Besides, it would deprive the consignee of that lien, which the law gives him in the first place, to detain as creditor in possession, for all his claims and demands which he might have against the ship and cargo, or for the balance of any account, he might have against the consignor, for any former transactions. For these reasons, we are all of opinion, that the vessel and cargo ought forthwith to be restored to the consignee Mr. *Potter*, or to his agent; and that the sheriff should serve a copy of the attachment on him, as in common cases, where garnishees are in possession, or supposed possession, of the goods of the absent debtor.

There is yet another point in this case worthy of attention, which is, captain *Jansen's* claim to part of the ship. That cannot possibly be determined on this motion. The copy of the writ should have been served also upon him, to compel him to come in on oath, and shew his right of property; upon which the plaintiff may take issue and try the point before a jury, if he thinks proper.

Let the rule for the restoration of ship and cargo to the consignee be made absolute.

Present, BURKE, GRIMKE, WATIES and BAY.

HEZEKIAH WADE *against* JOHN BARNWELL.

Charleston District, 1799.

When a country is taken possession of by an enemy, and is repossessed again by the former sovereign, the property which was taken by the enemy and regained by the former proprietor, is secured to the original owner or party repossessing again by the *jus postliminium*.

CASE on a special verdict found at *Beaufort*.

This verdict stated substantially, that sundry negroes therein named, which formerly belonged to a Mr. *Knox*, a *British* subject in *Georgia*, had been confiscated during the revolutionary war, and sold; but that some time in the year 1778, when the *British* repossessed themselves of *Georgia*, and overrun that country, *Knox*, the original owner of the negroes, regained possession of them, and when at the close of the war, the *British* finally evacuated that state, took them off with him to *Jamaica*, where he kept them several years, and then sent them into *South Carolina* for sale, when the defendant *John Barnwell*, became the purchaser: whereupon *Wade*, who claimed under the sale by virtue of the confiscation act in *Georgia*, commenced his action of trover for recovery of them, as being his property. The verdict then submitted the question to the court, whether from the foregoing circumstances, the property of the negroes in question was in *Wade*, who claimed under the act of the state of *Georgia*, or in the defendant, *Barnwell*, who held under the original proprietor?

Mr. *Holmes*, for the plaintiff, insisted, that the property of an enemy found in the state of *Georgia* during the war, after the declaration of independence, by the *jus belli* became liable to seizure and confiscation; and that the supreme authority of the state had by an act declared the same to be confiscated, and directed a sale for the use and benefit of the state, at which sale, Mr. *Wade*, or those under whom he claimed, were *bona fide* purchasers. A higher title than this, he said, could not well be submitted to the consideration of a court of justice.

Wade v. Barnwell.

Mr. *Desaussure*, on the part of the defendant, argued, that the contest between *Great Britain* and *America*, was at first a dispute between two great parties of the same empire, contending for rights and privileges on one hand, and for the supreme and uncontrolled power and authority of the mother country on the other. That in such a contest, the right of property remained in a great measure undecided, till the dispute was ended and a treaty made, confirming the rights to each of the great parties so engaged; and this ought to have been the true policy both of *Great Britain* and *America*. But admitting that the same rules which governed foreign nations at war, were applicable to this country after the declaration of independence, it is evident that on the retaking of *Georgia* by the *British*, all the property taken or acquired by the *Americans* from the other party, and retaken and repossessed again by the original owners, *flagrante bello*, reverted absolutely and unconditionally, in the original proprietors or owners, by the *jus postliminium*, a well known and acknowledged part of the law of nations, which is paramount to all municipal regulations. By this law, things taken by the enemy, and regained by the former owner, are restored to their original state and condition, as fully and completely, as if they had never been taken. Upon these principles, then, he contended, that upon the repossession of the state of *Georgia* by the *British*, in the year 1778, after the *Americans* had been nearly all driven out of the country, Mr. *Knox* being then a *British* subject, and regaining possession of his negroes, acquired an absolute right to them, and his title was as fully confirmed to him as if they had never gone out of his possession. That the act of *Georgia*, and sale during the heat of the contest, and before the treaty of peace, did not alter that part of the law of nations, which gave Mr. *Knox* this right of repossessing himself of his property wherever he could find it within the limits of *Georgia*, after the *British* got possession of the country. It was a risk which the purchaser ran, and he must now take the

Vattel, chap. 14. sect. 204. *Gro.* book 3. chap. 9.

consequences of it, or apply to the legislature of *Georgia* for redress.

Wade v. Barnwell.

The judges after duly considering the circumstances of the case submitted to them by this special verdict, were unanimously of opinion, that the judgment should be rendered up for the defendant *John Barnwell.* The *jus postliminium*, upon which this case turns, and by virtue of which, things taken by an enemy are to be restored to their former state or owners, when a country comes again under the power of the nation to which it formerly belonged, is a very important branch of the law of nations, and is founded on the obligation which every sovereign or state is under, to protect the persons and goods of its subjects or citizens against an enemy; should any fortunate event bring it again under such sovereign power, he is bound to restore them to their former state, and to give back the effects to the owners to whom they originally belonged, and to settle every thing as they were before they fell into the enemies hands. Hence it is, therefore, that a private individual acquires a right *to every thing which belonged to him before they were taken by an enemy*, as soon as a country comes again under the power or dominion of the sovereign to whom he is a subject, or owes allegiance. This postliminary right is of very ancient origin, and seems to have been respected by all nations, from the days of the ancient *Greeks* and *Romans*, down to the present day. It would ill become a young people, therefore, just taking their rank and station among the nations of the world, to disregard so important a principle of the national law. And however we may be disposed to respect the acts and proceedings of our sister states, as municipal regulations, yet whenever they come in contact with, or in opposition to, the governing code of nations, we are bound to say they must give way.

Gro. book 3. chap. 9. *Vattel, lib.* 3. chap. 14.

Let judgment be entered for defendant.

Present, GRIMKE, WATIES and BAY.

Charleston District, 1799.

WILLIAM SHAW *ads.* ROBERT M'COMBS.

If a verdict is delivered in on *Sunday* morning after the expiration of the twelfth hour, it is void, and will be a good ground for a new trial, agreeable to the common law maxim, *dies dominicus, non est dies juridicus.*

SLANDER. This was a case tried at *Cambridge*, in which the jury gave 1,000 dollars damages.

A motion was made for a new trial, and by consent it was argued at *Charleston*, instead of *Columbia*. The principal grounds were, 1st. Excessive damages; and, 2d. That the jury did not deliver in their verdict until *Sunday* morning. There was another ground, to wit, misconduct in the jury in eating and drinking at the expense of the plaintiff, after they had gone out to consider of their verdict. But the ground on which the defendant chiefly relied, was the second ground; that the verdict was not delivered into court until a considerable time after the hour of adjournment; and to substantiate this fact, a certificate of the clerk was produced under the seal of the court, which stated that the verdict was not delivered in by the jury until some time on *Sunday* morning, a considerable time after twelve o'clock, the hour limited by law for the conclusion of the term.

It was then urged in support of the motion, that this verdict ought to be set aside, on this ground alone, if there was no other to support the motion; that the act of the legislature authorized the court to meet at *Cambridge*, in *Ninety-Six* district, on the 16th days of *April* and *November* in each year, and to set ten days, or until the business of the court was finished. But it is a well known rule of the common law, that the Lord's day, commonly called *Sunday*, is not a day in law, *dies dominicus, non est dies juridicus*; consequently, all temporal business transacted on that day, is null and void, as it is set apart by our holy religion, for the worship of the Almighty, and the necessary preparations for that purpose. The court it was said, might sit till the last minute of the twelfth hour, but no longer.

The judges without further argument, or hearing any thing said on the other grounds, set aside the verdict and ordered a new trial on this ground alone.

Shaw ads. M'Combs.

Present, BURKE, GRIMKE, WATIES and BAY.

WILLIAM SKIRVING *against* Executors of JAMES STOBO.

Charleston District, 1799.

ASSUMPSIT for the use and occupation of a house.

No interest is recoverable on open or book accounts or any unliquidated demand, previous to the finding of a jury.

In this case, the jury assessed a sum for the annual rent of the house in question, but allowed no interest on the different sums so fixed for the rent after the expiration of each year, although the presiding judge, WATIES, charged them to that effect.

This was a motion for a new trial, on the ground, that the interest was recoverable on each year's rent, after it became due; and also, because it was a finding against the direction and charge of the judge.

But the judges, after hearing arguments, refused the motion, observing, that this was an unliquidated demand, and no express promise to pay interest after the end of each year, was proved. That it was a matter sounding entirely in damages, which were not ascertained till the finding of the jury, and that too on a *quantum valebat*; therefore the principle of the cases in the *English* books, which says interest shall be allowed on all liquidated sums, will not apply in this case; for there was no liquidation here, until the finding of the jury, and upon this principle it is, that juries have, under the direction of the courts for more than twenty

Skirving v. Stobo.

years past, refused to allow interest upon all open or book accounts, and this demand is on the same footing.

Rule for a new trial discharged.

Present, BURKE, GRIMKE and BAY.

N. B. The instalment act of 1788, allowed interest on *all judgments* which were not recoverable, otherwise than by five annual instalments. But rent was one of the exceptions out of this act, and could be recovered according to due course of law, without any impediment.

CASES

ARGUED AND DETERMINED

IN THE

CONSTITUTIONAL COURT OF APPEALS,

OF THE

STATE OF SOUTH CAROLINA.

IN THE YEAR 1800.

JANUARY COURT OF APPEALS, 1800.

Charleston District, 1800.

County courts abolished in *South Carolina*, and supreme courts of judicature established in each county which were erected into districts.

AT the meeting of this court, a new æra in the history of the jurisprudence of this country commenced. At the last meeting of the legislature in the month of *December*, immediately preceding this court, the county court system which had prevailed since the year 1785, in *South Carolina*, was abolished by an almost unanimous vote of both branches of the legislature; and all the counties in those parts of the state where county courts had prevailed, (for the lower part of the state never had them,) were by an act of the legislature, erected into districts, and supreme courts of judicature were established in each; and some new districts were created out of the lower divisions of the country, where the county courts had never been established; ma-

king in all twenty-eight districts. These districts were divided into circuits, and one of the supreme court judges, was authorized and required, to ride one of those circuits, and hold the courts twice in every year; with liberty to the parties in all cases, to appeal from the decisions in the district courts on each circuit, to the constitutional court of appeals held at *Columbia*, by all the common law judges, the week next after the conclusion of the circuit courts, for the purpose of hearing all points of law, arising in the upper part of the country; from whence they adjourn to *Charleston*, to hear and determine all law questions, arising in the lower division of the state. By this arrangement of the judicial system of *South Carolina*, it was placed nearly on the footing of the *Nisi Prius* system of the courts of *Great Britain*; as the judges on each of our circuits, have the same powers which the puisne judges in *England* have on their circuits, through the different shires or counties in that kingdom, and the meeting of the judges in the constitutional court of appeals, immediately after the conclusion of the circuits, for the purpose of hearing and determining all law points, arising in the circuit courts, may be assimilated to the meeting of the judges at *Westminster Hall*, to hear and determine all law points, coming up from every part of the kingdom, to be argued there. It will easily be seen, that this alteration and accumulation of courts of justice in the state, must add greatly to the duties of the supreme court judges, sufficiently arduous before. In order to alleviate the heavy burthen imposed on them by this new regulation, the legislature made provision for two additional common law judges, increasing the number on the bench to six, instead of four; and as judge BURKE had just been promoted to the chancery bench, the legislature went into the election of three new judges, one in the room of judge BURKE, and two additional ones, when WILLIAM JOHNSON, (now one of the judges of the supreme court of the *United States*,) EPHRAIM RAMSAY and LEWIS TREZEVANT, (both since deceased,) were elected to fill those seats.

Two additional judges of the court of common pleas elected, and one in the room of judge Burke, appointed a chancellor, namely, William Johnson, Ephraim Ramsay and Lewis Trezevant.

At a meeting of this court, therefore, WILLIAM JOHNSON and LEWIS TREZEVANT, took their seats as judges, Mr. RAMSAY being absent in the country.

LAWRENCE CAMPBELL *against* JOHN WILLIAMSON. *Charleston District*, 1800.

CASE on a policy of insurance.

This was an action on a policy of insurance effected on the brig *Russell*. From the papers produced, it appeared that this brigantine was bound to *St. Vincents* or *Barbadoes*, but her clearances were all for *Surinam*. She had as part of her cargo naval stores and contraband articles of war on board, all which were known to the underwriters, who received a premium of seventeen and a half per cent. *which covered all risks*. On her voyage she met with a gale of wind, which obliged her to bear away for *Antigua*, where she was captured, and vessel and cargo condemned as lawful prize.

On the trial, the captain's protest was produced, by which it appeared that she had been compelled by this gale of wind to bear away for *Antigua*, where she was met with and captured by an armed *British* privateer called the *Louisa Bridger*, who carried her into the port of *St. Johns*, where she was condemned.

The condemnation was also produced, under the seal of the vice-admiralty court of *Antigua*, from which it appeared that the brig *Russell* and cargo had been condemned *generally as lawful prize*, but no particular or special circumstances were set forth as the grounds of condemnation.

A ship parting from convoy by stress of weather, and compelled to bear away for another port, and taken while out of her course to the *destined port*, and condemned, will not exonerate the underwriters.

The protest of the master and mariners is good evidence of the tempestuous weather which compelled the vessel to bear away or depart from her true course.

The insured have a right to abandon on capture, and every endeavour to recover ship and cargo afterwards shall be intended for the benefit of the underwriters.

The only evidence necessary to shew the capture is the protest of the master and mariners, though the condemnation afterwards is undeniable corroborating evidence of the fact.

Campbell v. Williamson.

John M. Davis, a broker in *Charleston*, was produced, who proved that before the insurance was effected, he shewed the manifest of the cargo to the underwriters, which contained the warlike stores, &c. and that they were insured at seventeen and a half per cent. which covered all risks. The paper containing the manifest of the cargo, also stated, that the *Russell* was to sail over the bar in company with the *British* armed ship the *Jane*, bound also to *St. Vincents*, and that the captains had agreed to keep company together.

For defendant, several grounds were taken on the trial before the jury. 1st. That the grounds on which the vessel and cargo had been condemned, had not been set forth in the condemnation; that the reasons might have appeared to the underwriters, in order to have enabled them to go over against the *British* government, in case of an unwarrantable condemnation; which, it was alleged, it was the duty of the plaintiff to have done.

2dly. That there was an unnecessary deviation on the voyage, by the captain going out of his true course; and that the captain's protest alone was not sufficient evidence to shew that the ship was obliged to go out of her true course; he should have been examined and cross-examined on that subject.

And, 3dly. That she ought to have kept company with the ship *Jane*, who would have protected her against privateers.

In reply, it was urged, in favour of the plaintiff, that wherever there was a condemnation on general principles, as in the present case, it was conclusive against all the world; that the ship and goods were enemies property, or had contraband of war on board; that the insured were under no obligation to produce any other document than the condemnation, to entitle them to a recovery, and that if the underwriters wished for further information for their own satisfaction, it was their duty to have procured it; that the insured have a right to abandon in every case of capture, because then the object of the voyage is defeated, and this

was proved both by the protest and the condemnation; and as to the deviation, that was unavoidable, owing to a heavy gale of wind, as appeared by the protest of the master and mariners; consequently, it was one of the risks insured against, and that this protest of the captain and mariners was the best evidence of that necessity.

In charging the jury, the presiding judge (BAY) told them, that wherever a vessel and cargo is condemned by the decree or sentence of a foreign court of admiralty generally, *as lawful prize*, or as *enemies property*, it was conclusive against all the world; that the mutual intercourse of nations made it necessary that this faith and credit should be given to foreign tribunals. But that if decrees were made or given upon municipal regulations only, or upon doubtful or ambiguous principles, or upon principles totally unsupported by the law of nations, in such cases the parties might go into the merits, and shew that the goods were not lawful prize, or enemies property. With respect to the deviation in this case, he said, that was a fact for the consideration of the jury; that if there was a wilful deviation in the course of the voyage, it would vitiate the policy; but if a deviation is occasioned by stress of weather, then it was within the risk of the policy. That the protest of the master and mariners was before them, and from this it appeared they were obliged to bear away for *Antigua*. An objection had been taken to this protest, as not the highest evidence; but, for his part, he could not well see that higher evidence could be procured than that of the master and mariners, of a casualty or event happening *on the high seas*, where none *but themselves* could possibly witness the passing scenes or disasters which ships were liable to from storms and tempests. And when it is recollected also, that these protests are always made at the first port the vessel arrives at, after distresses of this nature happen, and while all the circumstances are fresh in the recollections of all on board, and before they could be tampered with by either of the parties interested in the event; it had always appeared to him,

Park, 350. *Marshall*, 288.

Campbell v. Williamson.

therefore, as deserving the highest credit. Besides, it was a sea instrument, not founded on municipal law, but received by the general consent of all commercial nations, from the necessity of the case; and the more especially, as masters and mariners are transient persons, shifting and changing from one part of the world to another, in such a manner as to make it extremely difficult, if practicable at all, to get their examinations after they separate, one going to one part of the world, and others to another, &c.

The jury retired, and soon after returned with their verdict for the amount of the plaintiff's demand.

And now a new trial was moved for, on the ground of misdirection of the judge who tried the cause, and as a finding against law.

Upon this argument, nearly all the grounds which had been taken on the trial were again urged by the counsel on both sides, and some new ones introduced, which had not been pressed on the trial particularly.

1st. That the *Russell* was to sail in company with the ship *Jane* over the bar, and to keep under her convoy during the voyage.

2d. That all the papers had not been produced, which should have been shewn on the trial.

On the first point it was contended, that this representation of the *Russell's* sailing in company with the ship *Jane*, was tantamount to a warranty for sailing with convoy, which, if not complied with, vitiates the policy; and that the meaning of sailing with convoy, means sailing all the way with convoy; and that if the *Russell* had sailed all the way with the *British* ship *Jane* to *St. Vincents*, she would have been protected; the captain of the armed ship *Jane* would have shewn that the clearances for *Surinam* were only intended to protect her from *French* cruisers, and that her real place of destination was a *British* port, which could not appear at *Antigua*, where she was condemned.

On the second ground it was strenuously urged, that the protest was not sufficient evidence of the necessity of the deviation from the true course of the voyage, and that even if it was, all the papers and proceedings in the vice-admiralty court of *Antigua* were not produced, as one of the articles of the treaty with *Great Britain* stipulates, that copies of all papers and proceedings in the vice-admiralty courts shall be furnished, when required; whereas nothing was produced upon the trial but the protest and condemnation, without any other document; that the captain had been very negligent in this particular; he was the agent for the owners or insured, and they are answerable for his omissions and neglects.

For the plaintiff, in reply, against the motion, it was said, that admitting that the representation of the insured amounted to a warranty to sail with convoy, yet if the protest of the captain and mariners was evidence, the matter contained in it was of full answer to this part of the argument, as from this it appears they were compelled by stress of weather to bear away for *Antigua*.

That as to the ground respecting the omission to produce papers, all that were necessary had been produced. Here it was argued, that the insured was under no obligation to produce even a condemnation; that it had been determined in many cases, and by some recent ones in this court, particularly before Mr. Justice WATIES, that it was sufficient to prove the capture, for then the insured had a right to abandon, as the object of the voyage was then defeated, and then the underwriters became liable; that the protest was full upon this point, as to the capture by the privateer *Louisa Bridger*, and the carrying in of the *Russell* into the port of *St. John's*; but the plaintiff had gone further in this case, and proved both capture and condemnation. With respect to the papers alluded to in the article in the *British* treaty, they were only necessary in case of appeals, and it was for

Campbell v. Williamson.

that purpose that copies of all proceedings were to be furnished, when required. If the underwriters wanted them, it was their duty, not the plaintiff's, to apply for them.

The Judges, after considering this case, were unanimous in opinion, that there should be no new trial.

The opinion of the court was delivered by Mr. Justice JOHNSON, to the following effect:

That upon the first ground taken, that of misdirection, it did not appear to this court there had been any on the part of the presiding judge, in charging the jury on the trial in the district court. All the writers on the law of insurance agree in opinion, that if a decree of a foreign court of admiralty condemn a ship or cargo as *lawful prize*, or as the property of *an enemy*, *generally*, without assigning any reasons, the law of nations will presume they have gone upon just and proper grounds, and it is conclusive and binding on all the world, and never after can be called in question by any of the parties interested. They are bound by it.

As to the evidence of the protest made by the master and mariners, to shew the necessity of bearing away for *Antigua*, which is assigned as a justification for the deviation in this case, it has always been allowed in our courts, as proper testimony of any matter or thing happening on the high seas, to go to a jury; or as proof of the loss of ship or cargo; and indeed it would be of infinite loss to individuals, as well as productive of much injury to commerce, if it were otherwise. The reasons given by the judge, in his charge to the jury, are strong and conclusive in point, and perfectly consonant to the law and practice of this country. And although there is a dictum of Lord Chief Justice *De Grey's*, in 1 *Esp.* 143, 144. which seems to doubt on this point, on a loss happening in a port or place where other witnesses could prove the loss as well as the master and mariners; yet it does not seem to militate against the great principle, as to accidents and disasters at sea, where none can witness them but those on board.

Campbell v. Williamson.

With respect to the new grounds taken on this argument, which were not pressed on the trial, the first was the not keeping company with the convoy. In all cases of this kind, where ships are warranted to sail and keep company with convoy, it is always understood *to be where it is practicable* to keep company with the convoy; but storms and tempests *are exceptions* out of this rule, founded *in nature*, against which no contract, either express or implied, can protect a man. This storm happened at sea, and compelled the captain to bear away for *Antigua*, from necessity; there is no doubt, therefore, but a deviation under such circumstances was excusable. The last additional ground was the non-production of papers; and here it appeared to the court, that the plaintiff had produced all he was bound to produce on the trial, in order to entitle him to a recovery; for he had produced the protest of the master and mariners to prove the capture, after he had been compelled by stress of weather to bear away; and the condemnation in the vice-admiralty court after the capture, which, in strictness of law, was perhaps more than he was bound to do. For it is well known, and has been often determined, (and very frequently in this court,) that the insured had a right to abandon on the capture; and the interference afterwards of the captain or master is considered as a benefit intended to the insurers. He is then considered as their agent, and even barratry or misconduct afterwards is chargeable on the underwriters, within the true intent and meaning of the policy.

Park, 348. *Marshall*, 279, 280

Rule for new trial discharged.

Present, BAY, JOHNSON and TREZEVANT.

Charleston District, 1800.

PIERCE BUTLER *against* BENJAMIN BAILY.

Taxes due to the state are to be paid in preference to all private debts; they create a lien which is paramount to every other demand whatever. And where a man does not make a return of his taxes agreeably to the general tax act, he is liable to be doubly taxed, and his estate is liable for the whole of the double tax.

RULE on sheriff to shew cause why he should not pay over moneys he had in his hands, arising from the sales of defendant's estate, towards satisfaction of a judgment he had against the defendant.

The *Attorney-General*, on behalf of the sheriff, shewed cause and claimed the moneys in the sheriff's hands on behalf of the state, for the arrears of several years' taxes due from defendant, amounting to 220*l.* 8*s.* 9*d.* sterling, on the ground that the state had a prior lien on defendant's estate, and must be paid in preference to all private individuals; he quoted the act for regulating the duty of collectors and assessors of taxes, &c. passed in 1788, which "imposes dou-"ble taxes on all persons, who should refuse or neglect to "make a due return, on oath, of all their taxable property; "and authorizes the assessors to make the said assessments "according to their judgments, and the best information "they can get of a defaulter's property." That the defendant, Mr. *Baily*, had been a defaulter for many years, and had neglected to make a return of his taxable property, until his arrears ran up to 110*l.* 4*s.* 4 1-2*d.* when the assessors doubled that sum to 280*l.* 8*s.* 9*d.* agreeable to the terms of the act; for which sum, the collector of the district issued his warrant under his hand and seal, which was lodged with the sheriff for collection district. The sheriff had, however, seized and sold the property of defendant in the mean time under Major *Butler's* execution, and had the money in his hands, so that the question was, whether the state, or the plaintiff, Major *Butler*, should have the money.

The *Attorney-General* contended, that the state had a lien on a man's property for the payment of taxes, paramount to any other claims whatever, or demands of any pri-

vate individual whomsoever. That it was the price of protection, which originated in the very nature of the social compact, and without which, government could not subsist a moment; withdraw that support and government was at an end. It was, therefore, upon these principles, that the state claimed a preference for taxes to all claims or demands whatever.

Mr. *Hunt*, for the defendant, argued, that admitting that defendant's property was bound in the first instance for the payment of taxes, it could be only for one year; as the tax collectors were bound to settle with the treasury annually, under a penalty of 300*l.* sterling. That the tax collectors were appointed under the authority of the state, and were to be considered as its officers, and they were punishable for neglect of duty, in not selling the defendant's property annually, or so much thereof as was sufficient to pay off the taxes every year; otherwise purchasers and creditors might be deceived by an indefinite lien on a man's property for any length of time, and that, too, to an amount that cannot be well calculated upon. That the arrears of taxes in this case were for a number of years back, and a great part of them were due on property which the defendant had since sold and disposed of; and it would be very hard indeed, to make the little pittance he had left, liable for the whole of those arrears; at all events, he said, it should be made liable only for a just and due proportion of the property the sheriff had sold. He further argued, that even admitting that the lien had an indefinite retrospective operation, and that the portion of defendant's estate left was considered as liable, it should not be construed so as to make the estate chargeable with more than the sum really due, 110*l* 4*s*. 4 1-2*d*. That the double tax was only intended as a penalty on defaulters, in not making their returns agreeably to law; and that like every other penalty, it should be discharged upon the performance of the condition annexed to it, which he

Butler v. Baily.

said, in the present case, would be the payment of the sums actually due, and any expenses which had accrued.

Mr. *Gaillard*, also for the defendant, observed, that what strengthened the construction given by his colleague, of the lien not binding longer than one year, was, that the tax bills of this state were passed annually at every session of the legislature, and were intended to operate only for one year, and that the tax collectors were in duty bound to compel payment, and settle with the treasury every year; and it would be wrong to permit the state to take advantage of the *laches* of its own officers, to the prejudice of *bona fide* purchasers and creditors; they ought to be made liable out of their own estates for their omissions or neglects, and the deficiences of taxes made good from them; that this kind of secret indefinite lien on all a man's property, might, if once established, be very dangerous to the community; as by that means, a tax collector may take away the property of a judgment creditor, at the moment when he was about to reap the fruit of his execution; when by due and reasonable diligence before, the taxes might have been collected, or probably there might still be property left, which might be found out by due diligence; and what made the inconvenience of purchasers and creditors greater, was, that there was no public office established where creditors or purchasers could get the necessary information.

The *Attorney-General*, in reply. There is nothing in the tax act, or any other act or law whatever, which limits the lien for taxes to one year only; this lien, therefore, from the very nature of it, must be indefinite, or in other words, it must remain *until paid*, as long as there is any thing *to pay* with; the limitation act, however it may run against individuals, will never run against the rights of the state. It is true, that what is called the tax bill for the supplies of the state, is passed annually, but this annual tax bill only fixes the *quantum*, and on what species of property the taxes shall be

raised. The general tax act of 1788, regulates the mode and manner of making the assessments and collections of the taxes, and this is a permanent law which comes in aid of the fundamental principles of government, and declares how and in what manner, all persons concerned in the laying on, and getting in the taxes, are to be chosen and appointed, and how their conduct is to be regulated; and also the mode and manner of making the returns of taxable property to the collectors, and in general regulates the principles by which all future taxes are to be collected, and the conduct of the officers are to be governed: but this act fixes or lays on no tax on any property whatever; it only regulates the general principles of apportioning, collecting and bringing into the treasury, those contributions which every man was previously bound to pay, for the support of the government of the country under which he lives, and is protected. By the mode established by the general tax law, the assessment is made on the whole of a man's estate, real and personal, on the aggregate, and not on each particular part of it. It would be very inconvenient, if not entirely impracticable for the assessors and tax collectors. to be riding over the state, hunting out every particular specific portion of a man's real and personal estate, which might from time to time be liable to taxation, in order to fix an assessment on each part; hence it must be evident, that the assessment must be on the whole or aggregate; and hence it results, that the whole or any part which can be most conveniently found, or come at, must be liable for the whole amount due. As to the inconvenience, which it was said purchasers or creditors might be subjected to, this might easily be removed, by going to the tax office, or the treasury or comptroller's office; in all which, they might easily satisfy themselves whether a man's taxes have been paid off or not, and if they did not take that trouble, it was their own fault. That with respect to the tax collectors not doing their duty, they might either be made liable by a suit on the behalf of the state, on their bonds, or any private indi-

Butler v. Baily.

vidual might have his private remedy by a special action on the case, for any damages he might suffer by their neglects or omissions. But their *laches* in not performing their duties, was not to deprive the state of this high prerogative right of doing itself justice, whenever an opportunity presented it for that purpose. That so transcendant was this right, that neither length of time, nor the act of parties, can ever bar it of so high and necessary a power. He further contended, that the double tax for neglect of making a due return, imposed by the act of 1788, could not be construed as a penalty, defeasible on the paying what was originally due; but an increased tax, which becomes absolutely and unconditionally due and payable, after the day limited by law, for making the necessary return. It was like a fine imposed on refractory citizens, for doing, or not doing, what the law prohibits or enjoins; and the policy of this law was wise in itself, as it was easy to see, that it might frequently happen, that many designing citizens would conceal their property for a long time before they made a proper return on oath, and then at last, only pay what they ought annually to have done; by which means, the revenue of the state might frequently fall short of the exigencies of the government. This part of the act was to compel every man to come forward once a year, honestly and fairly to bear and pay his proportion of the public burthen, whatever it might be, more or less; that they might not fall partially on the punctual part of the community, but on all without distinction, agreeably to the property he possessed. That this had been found from experience, to be one of the best clauses in the act, as it had a tendency to enforce itself, by the nature and certainty of the penalty, that hung over every delinquent's head, and if he incurred it, he had himself to blame, and what made it the more efficacious was, that there was no defeasible clause in it, or power given to the courts of justice, or any of the public functionaries to remit a dollar of it; the collectors under a large penalty

were bound to pay it into the treasury, and nothing could draw it out, but a public law of the state.

The judges were unanimous in this case, and delivered their opinions *separatim*, at considerable length; but when condensed, they were to the following effect:

That the soil of every country, and all the property of the inhabitants thereof, by the nature of the social compact, and the fundamental principles of every well regulated government stood pledged, and were liable for the support and defence of the state, and its government, to the extent which might be necessary for such defence and protection; and without such aid and assistance, the government could not be maintained and kept up, nor the state protected. In return for which, the government on its part, was bound to support and protect every individual citizen within the limits of the state, in all their rights and privileges, in peace and tranquillity; and in order to accomplish this great end effectually, there was nothing which it ought not to hazard, either of blood or treasure, which might tend to secure and perpetuate these inestimable blessings. Hence, the origin of those great and reciprocal duties of allegiance and protection, and hence also, the origin of taxes and taxation.

That from these principles, it was clearly deducible, that the payment of taxes, or the contribution of those aids necessary to defray the expenses of the government, must of necessity be a paramount obligation, and of course take place of all private contracts between citizen and citizen, of what nature or kind soever they might be. That so high was this obligation to the public, that it might well be compared to a mortgage, *pro tanto*, which created a *lien* on every man's real and personal estate, for his share of the public taxes, according to the rules of appointment which the law had established.

This then being evidently the case, it was clear that the state had a prior right or preference, to any individual citizen, for the amount of the taxes due and unpaid by every

Butler v. Baily.

delinquent whatever; and as these taxes were imposed generally on the whole of a man's property, it was equally clear, that any part of it that could be come at was liable for the payment of those arrears.

That with respect to the double tax, this court had no right or authority to consider it as a penalty defeasible, on the payment of what was originally due; on the contrary, it appeared to be an increased tax, after the time limited for making the annual return; that the law was positive upon the subject, and enjoins it as a duty on the collectors to issue their warrants and levy the same, and pay it into the treasury. That this court had no right to interpose between the collectors of the public revenue and the state treasurers; no such power was given by the act of 1788, nor was there any principle of public law to warrant such an interference.

The rule was made absolute on the sheriff, to pay the whole amount of taxes mentioned in the collector's warrant to the treasurer, and the residue, if any, towards the plaintiff's execution.

Present, WATTS, BAY and JOHNSON.

N. B. A number of cases after this decision, were taken into the court of equity for relief from the double tax, but the parties were refused it, upon the principle of the *above decided case.*

EDWARD PENMAN *against* JOHN HART, Sheriff of *Charleston* District.

Charleston, January, 1800.

CASE on a special verdict.

This case came before the court on a special verdict, which found substantially, that the plaintiff obtained his judgment in the court of common pleas, against the defendant *David Ramsay*, on the 2d of *March*, 1797, on which an execution issued, and a levy was made on a house and lot in *Meeting-street*, in *Charleston*. When this house and lot were advertised for sale, *John M. Ehrick*, produced title-deeds to the sheriff, for the lot in question, dated 14th of *January*, 1797; but these deeds to *Ehrick* were not recorded till 11th of *January*, 1798. Upon the production of these deeds to the sheriff, he refused to proceed in the sale of the house and lot; whereupon the present action was commenced against the sheriff for not doing his duty. The special verdict then concluded in the usual manner, referring the construction of the law to the court, and finding accordingly.

A deed not recorded within six months, is not thereby rendered invalid; nor does a mortgage lose its lien for such omission, so as to give a subsequent judgment a priority to either of them. The 45th section of the act of 1785, related only to counties where county courts were established, and did not extend to other parts of the state.

Mr. *Desaussure*, on the part of the plaintiff, argued, that although *Ehrick's* deed was prior to the date of plaintiff's judgment, yet it was not recorded until near twelve months after; therefore void as against creditors and *bona fide* purchasers; and for that purpose, relied on the 45th section of the county court act, passed in 1785, and on the clause in the act of 1789, allowing twelve months to record deeds, which had been made before the passing of the county court act, which he said, proved that it was considered as a general law throughout the state, and that thereafter, all deeds should be recorded within six months after their execution.

Public Laws, 382.

Mr. *Gaillard*, for defendant, in reply, urged, that the county court act was local in its nature, and was restricted to

Penman v. Hart.

those portions of the country only, where county courts had been established, and did not extend to the lower divisions of the state, the districts of *Charleston*, *Georgetown* and *Beaufort*, or any other parts where those inferior courts had never prevailed. He likewise contended, that the act of 1789 was retrospective, and not prospective; that the recital of the act as well as the enacting clause, proved it to be so without doubt; the recital stated the mischiefs which might arise by so great an alteration in the law respecting real estates, by a clause concealed in an act, purporting to be for the purpose of *establishing and regulating the proceedings in the inferior county courts only*; a clause which might defeat the titles of many, who held deeds and conveyances of lands, who might be totally ignorant of such a clause in the body of an act, for so different a purpose; it then goes on and enacts, that persons holding such deeds, should record them in the county courts within twelve months after the date of that act. That this was not making it a general law, but left its locality where it found it, still attached to county court jurisdictions.

Mr. *Ford*, for plaintiff, insisted, that ever since the passing of the act in 1785, establishing county courts, this clause, requiring deeds to be recorded within six months after their execution, had been considered as the general law of *South Carolina*, by most, if not all of the practising lawyers at the bar. It was true, he said, there had not been any judicial decision to his knowledge on the subject, but he himself for one, and many others of longer standing than himself, and whose opinion he bowed down to with respect, had considered it so also; and it would be a very dangerous thing at this day, to call it in question after such a construction had for fourteen years been generally given to this clause; that the whole of the state had been divided into counties, and *Charleston* was made a county also, although no county courts had ever been held in it; yet the act attaches itself on *Charleston*, as well as upon the other counties; that there was no express clause in the act to confine this regulation

Penman v. Hart.

...ies only where county courts were established, ...it was general throughout the state.

...torney-General, for defendant, concluded the argu... observing that it was unreasonable to construe ...e a general law of the state, and although it may ...been considered as such by some gentlemen of the ... yet he had never conceived it as extending generally ...ughout *Carolina*; for the very regulation itself, upon ...ttentive consideration, would appear to be a local one in ... nature. In the first place, it related to lands lying in those counties only where county courts were established, and being within the limits of those counties, and to no others; for deeds for lands lying in one county, could not be recorded in the clerk's office of any other county; but were to be recorded in the office of the county where the lands were situated, or if they were recorded in any other county, it was of no avail. Secondly, it requires that the deeds should be proved before the judges of the county court, where the lands lay, previous to their being recorded; he insisted, therefore, it was impossible to prove deeds before judges where none were appointed, or to record them in offices where none were established; so that from the necessity of the case, the regulation must be confined to those portions of the county only, where these inferior jurisdictions had been established; he admitted, that *Charleston* was nominally one of the counties mentioned in the act of 1785, and that counties had nominally been laid off in all the lower divisions, but it was notorious to every man in the state of common observation, that the lower divisions of the state were utterly opposed to county courts, and the whole county court system, as inconsistent with the true interests of the country, and believed that they would prove a curse rather than a blessing wherever they might be established. Under this idea, then, the act passed; that those portions of the county which wished them should have them, and those which did not wish them should be exempted from the plague and burthen of them; consequently, the lower parts near the sea coast, *Charleston*,

Penman v. Hart.

Georgetown and *Beaufort*, never had them; while *Cheraw*, *Camden* and *Ninety-Six* districts had them established; but finding from sad experience the bad effects of them, have come forward almost to a man, and had them abolished in the upper divisions of the country, so as to free *South Carolina* entirely of such useless and troublesome jurisdictions. From this view of the case, then, it was most evidently a partial regulation, which was in force only where those courts were established; that it was coexistent with them, and ceased with their existence.

Deeds for lands in *Charleston* district, did then, as they do now, depend upon the general law of the land, as they did before the passing of that act; and as the law stood before the passing of that act, and as it does now, there was no time fixed for recording of deeds: every man recorded them as it suited his convenience, or omitted to do so if he thought proper; the only risk he ran was the chance of another man's getting another deed from the same grantor, and putting it first on record; in which case, the younger deed recorded, would have a preference under the "*act for* "*preventing double conveyances and mortgages.*" But if he was not afraid of another conveyance being put on record he might omit recording it entirely if he pleased. He quoted the case of *Ashe* v. *Ashe*, v. 1. p. 304. *Riley's* edit. as in point, where a mortgage was found among the papers of a deceased man, twenty years after his death, without being recorded which had the preference of a judgment entered up many years after, although the land had been sold by the sheriff, and the money paid over to the plaintiff in the action at law; he also said, the construction contended for, went to defeat the vested right of a freehold estate in lands by implication, which was against law and common right.

The court was unanimously of opinion, that the 45th clause of the county court act, passed in 1785, were confined to the counties where county courts were established only, and never extended to any other parts of the state; consequently, that this case was to be governed by the law

Penman v. Hart.

as it stood before the passing of the county court act in 1785, and by the law as it then stood, there was no time limited for recording deeds of conveyance of lands or mortgages; if, indeed, a younger deed or mortgage was obtained from the grantor or mortgagor, for the same lands, it had a preference; and that (as has been stated by the *Attorney-General*) seems to be the only risk which the grantee or mortgagee run, by not recording his deed or mortgage. Conformably to these principles, the case of *Ashe* v. *Ashe*, was determined, and also another case of *Ashe* v. *Executors of Livingston*, since, to recover money paid over by the sheriff to a judgment creditor, not knowing of a mortgage prior to the judgment; by virtue of which, lands had been sold, and the money received by the plaintiff at law.

See the case of *Ashe* v. *Executors of Livingston*, decided in 1797, *ante*.

Let therefore judgment be for the defendant in this case.

Present, BAY, JOHNSON and TREZEVANT.

NATHANIEL HEYWARD *against* WILLIAM BRAILSFORD.

Charleston, January, 1800.

TRESPASS to try title to a house and lot in *Meeting-street*, in the city of *Charleston*.

This case came before the judges on a special verdict, founded on the last will and testament of *Daniel Heyward*, deceased; as the right and title to the premises in question, depended on a true construction of that will.

The intention of the testator is the principal thing to be regarded in the construction of wills, and where distinct estates are devised to the youngest and next youngest children of the testator who should arrive at the age of 21 years, and the two youngest at the time of the testator's death die before they come of age, the two next youngest and youngest who arrive at that age and survive, shall take the estates so devised as contingent remainders.

The special verdict stated, that the testator *Daniel Heyward*, being seised and possessed of the house and lot in question, made his last will and testament on the 7th of *June*, 1776, and therein and thereby, devised to his son *Thomas*, and another person, in trust for his wife during her

Heyward v. Brailsford.

life, the use of his house and lot in *Charleston*, (being the premises in question,) with the furniture, and also several house servants; also, his plantation or tract of land containing 764 acres of land, with all the slaves, &c. thereto belonging; and at her death he devised the plantation or tract of land and negroes on it, to *his youngest child, that should attain the age of twenty-one years, and his or her heirs for ever;* and the *house and lot, slaves and furniture*, &c. *to the next youngest child that should attain to that age;* and in case any of his youngest children should die before they attained that age, if they should have lawful issue, they should inherit.

That the testator also devised to his sons *Thomas* and *William*, in trust for his daughter *Elizabeth*, during her life, the following lands, slaves, and stock thereon and the appurtenances, and at her death gave the lands to the male heir of her body, when he should arrive at twenty-one years of age; and for the want of such, to the eldest female that should attain that age, or her lawful issue; and slaves to be divided among the heirs as above mentioned; and in case of no such heirs, then he gave the land and slaves to his youngest child that should attain the age of 21 years; namely, his plantation on *Port Royal Island*, and two tracts of land at the *Oaketty's*, &c.

The verdict then found, that the testator made a codicil to his will on the 15th of *July*, 1777, by which he provided for his son *Benjamin*, who was born after making his will; also, another codicil on the 28th of *July*, 1777, leaving his will and codicil in force, also leaving alive the following family, viz.

His widow, Mrs. *Heyward*, who departed this life the 6th of *April*, 1788, which was before Mrs. *Brailsford*, the wife of the defendant attained twenty-one years of age, and before the death of *Benjamin*.

Sons, *Thomas*, *Daniel* and *William*, all of whom were of age at the time of making the will.

Son *James*, under age at the time of making the will, but attained the age of twenty-one and died without issue.

Son *Nathaniel*, the plaintiff, born 18th of *January*, 1766, under age at the time of making the will, now alive and has lawful issue.

Daughter *Maria*, now Mrs. *Brailsford*, who arrived at twenty-one years of age, and has issue.

Daughter *Elizabeth*, born 12th of *February*, 1773, under age at the time of making the will, and died in 1780, under age, unmarried and without issue.

Son *Benjamin*, born 17th of *November*, 1776, after making his will, who died in *September*, 1796, under age, unmarried and without issue.

" That on the decease of the daughter *Elizabeth*, and af-
" ter the death of the widow, in *April*, 1788, *William Brails-*
" *ford*, who had intermarried with *Maria*, as the then *next*
" *youngest child*, took possession of the house and lot in dis-
" pute; and on the death of *Benjamin Heyward*, in 1796,
" *William Brailsford* took possession of the *Rose Hill* and
" *Port Royal Plantations*, and claimed the negroes in right
" of his wife, as the youngest child of the testator.

The verdict then concluded as usual, " that if the law
" was, upon the true construction of the will, for the plain-
" tiff, then the jury found for the plaintiff, *Nathaniel Hey-*
" *ward;* but if for the defendant, then the jury found for
" the defendant, *William Brailsford*."

Mr. *Ward*, for the plaintiff, laid it down as a position which was generally admitted in the construction of wills, that the circumstances which existed at the time of testator's death were to be particularly regarded, and should not depend on subsequent contingencies. That the testator had not in view in the present devise any particular child or children, but only such particular classes of them who should arrive at the age of 21 years respectively. It was, he said, a calculation of chances, whether his children, who were then minors, should arrive at 21 years or not. All the words of a will are to be construed according to the natural intent and meaning. It is immaterial which words of a will

1 *Durn. and East*, 597. 1 *Vez.* 235. 2 *Vez.* 1.3 32. 1 *Brown*, 489. *Fearne*, 392.

Heyward v. Brailsford.

come first or last, the construction must arise from the whole.

That a devise to the heir at law of another is void, if given during the life of the father. But the court will take notice of the character of the person intended. 1 *P. Wms.* 229. 517. *Doug.* 418. 482. So that, upon the whole, the intent of the testator is always to govern, where it can be collected from the whole of the will, or from different parts of it which relate to the same subject. It is plain, therefore, from this will, that two distinct and separate estates were devised and given to two distinct and separate branches of the family; the plantation and negroes to the youngest, (Mrs. *Brailsford*,) and the house and lot to the next youngest which came of age, (i. e. the plaintiff, *Nathaniel Heyward*,) and no others could take these portions of the testator's estate but them, without doing violence to the testator's intention.

Mr. *Gaillard*, for defendant, admitted that the intention should govern in the construction of wills, unless controlled by operation of law. The law did in the present case control this devise, and made what might otherwise be considered a contingent remainder *an executory devise.* That *Maria*, Mrs. *Brailsford*, was the youngest child who arrived at 21 years of age, and the moment she came to that age, the estate in the house and lot became vested in her by operation of law; and it was doing no violence to the testator's meaning, to say he meant and intended the next youngest child at the death of his widow, Mrs. *Heyward.* This construction, he said, would unite the principles of law and the intention of the testator together. Whereas the principles contended for by plaintiff's counsel, who preceded him, dissevered them, and placed them at variance with each other. But, he said, whether this was a remainder or an executory devise, the property vested in Mrs. *Brailsford* on her coming of age; and, having once vested, she never could be devested of her right. A contingent remainder requires a free-

hold to support it; but Mrs. *Brailsford* had no freehold, only the *usufruct* of the estate, which was vested in trustees. It must, therefore, be considered as an executory devise to Mrs. *Brailsford*. *Fearne*, 305. *Ibid.* 229, 230. 239. 434. A devise to an unborn son will be completely vested in him on his birth; so a devise to a daughter, on her coming of age, vests the estate absolutely when that event happens. Mrs. *Brailsford* was the next youngest child on the death of *Elizabeth*, her sister, and, on that event happening, the estate vested in her.

Mr. *Desaussure*. If the court was to give the defendant the house and lot in dispute, it would unite the estates which the testator intended to be kept separate. Let it be asked, he said, who was the youngest child of the testator who attained 21 years of age? The answer is, Mrs. *Brailsford*. Who was the next youngest child who attained that age? The answer is, *Nathaniel Heyward*, the plaintiff. Is it not, therefore, most evident, that these two devises were intended to be kept separate, as a provision for his two youngest children, and never was intended to be united in any one to the prejudice of the other. Upon the doctrine of intention, he said, it was so clear that it was almost needless to go into it. It was the first and most universal principle concerning the construction of wills, to inquire into the intention of the testator, and whenever that intention can be collected or discovered, it ought to govern. 1 *Burr*. 38. *Robinson's* case, a leading case on this head. But this point was so clear, that he would not dwell upon it.

Mr. *Parker* concluded the argument for defendant, and conceded the principle, that the intention of the testator, in the construction of wills, should always govern, unless controlled by some rule of law. In the present case, he said, the testator had created a kind of lottery, in favour of his younger children, and any one of them might draw two prizes. It might not have been the intention of the testator to have given both estates to one person, yet as the chapter

Heyward v. Brailsford.

of accidents had turned up, two prizes might be drawn by one of his children, and then that child must take. Next youngest child, must mean the next youngest child at the *death of his widow.* This, therefore, he contended, was an executory devise to Mrs. *Brailsford*, or it would otherwise have gone to his heir at law, which never could have been the testator's intention. *Fearne*, 230.

The Judges, after considering this case, were unanimously of opinion, that in the construction of wills, the intention of the testator ought always to govern, or to be particularly attended to, wherever the intention can be discovered or traced out from the whole of the will taken together. Let it then be asked, what was the intention of the testator in the devises under consideration? and the answer is plain and evident, that it was to make a provision for his wife during her life, and, after her death, for the two youngest children, whoever they might be. The testator had a large family of children, and it appears he had a large estate to divide among them; and it was very natural for him, after settling the elder ones, and giving them their portions, to make provision for the younger ones, as they grew up and came of age. And as they had not an immediate occasion for their portions, and lived with the mother, he seems to have intended to give them their shares out of the estates devised in trust for the mother, after her death. According to this intention, then, he appears to have made his will, and that too in plain and intelligible terms. "*That the* "*plantation and negroes should go to the youngest child who* "*should attain the age of* 21 *years*; and *the house and lot in* "*town, servants and furniture, &c. he gave to his next* "*youngest child, who should arrive at the age of* 21 *years.*"

According to this plain intention of the testator, if *Elizabeth* and *Benjamin* had lived to arrive at the age of 21 years, they would have taken, because one was the youngest, and the other the next youngest child. If only one of them had live to come of age, then that one and Mrs. *Brailsford* would have taken the estate. But as neither of them lived

to come of age, or left lawful issue, who then on their death were to take? The answer is, still the youngest, and next youngest of his children. And who were they? Unquestionably Mrs. *Brailsford*, and *Nathaniel Heyward* answered this description.

But it is said, the house and lot vested in Mrs. *Brailsford*, on the death of *Benjamin* and *Elizabeth*, as an executory devise, and having once vested, she never could again be devested of it; it became her's absolutely. And here it is alleged, that this rule of law controlled the intention of the testator, and gave her by operation of law, the whole of the estates which might have been intended for the youngest, and next youngest children by the testator originally. But this is evidently a mistake; because, there was no specific devise of this house and lot to Mrs. *Brailsford*, after the death of *Elizabeth* and *Benjamin*, either express or implied; for the estate was in trustees, and could not possibly vest until after the contingencies happened, namely, the death of the mother, and the death of the two youngest children successively; then it was held in trust, for what? for the uses and purposes mentioned in the testator's will. It then went over acoording to the terms of the will to the *next youngest child*, and Mrs. *Brailsford* took the *plantation and negroes*, as the *youngest child* which arrived at twenty-one years of age, agreeably to her father's intention, as a contingent remainder.

Upon the death of *Benjamin*, she changed positions; and instead of being the *next youngest* child of the testator, she became the *youngest;* and this was the kind of lottery mentioned by the last gentleman in the argument, or chance created by her father's will. It was a change of situations naturally resulting from the death of the two youngest children.

It is the duty of the judges, to find out the intention of the testator if possible; and when discovered, to see that it be carried into due execution. That being the case, it is evident to all of them, and they are unanimously of opinion, that the house and lot in dispute, eventually went into *Na-*

Heyward v. Brailsford.

thaniel Heyward, as the testator's next *youngest child* that survived and arrived at twenty-one years of age; and that agreeably to the finding of the jury, judgment should be for the plaintiff in this action, and that the record should be delivered over to him, in order that final judgment may be entered on it in his favour.

Present, GRIMKE, WATIES, BAY, JOHNSON, and TREZEVANT.

Columbia, 1800.

THE STATE *against* WILLIAM HOLLY.

Forging an order for the delivery of goods is felony within the meaning of the statute, though no precise words are necessary to constitute the offence, if it is calculated to deceive and defraud. But if the indictment states the offence to be against a *British* act of parliament made of force here, when in fact no such act had ever been made of force, instead of concluding against the act of the legislature of the state, it is a good ground to arrest the judgment.

FORGERY. Case from *Camden*, in *Kershaw* district.

The prisoner in this case had been convicted of forging an order, purporting to be an order drawn by *Charles Evans* on Mr. *Coleman*, a shop-keeper in the town of *Camden*, in favour of one *John Adner*, or bearer, for the delivery of goods, and which he desired to be charged to his, *Charles Evans's account*, and for which, the order expressed, he would be obliged to Mr. *Coleman* for so doing.

This order was presented by the prisoner to Mr. *Coleman*, who refused to deliver the goods on suspicion of its being a forgery; the prisoner was afterwards taken up, tried, and eventually convicted of the offence.

Mr. *Brevard*, counsel for the prisoner, moved in arrest of judgment on two grounds.

1. That this order was not such an instrument of writing, as the act against forgery contemplated.

2. That if it was, the indictment was defective, and void for uncertainty.

On the first ground, Mr. *Brevard* contended, that this was not such a warrant or order for the delivery of goods,

as brought this case under the statute. That the kind of order for the delivery of goods contemplated by the act, was one where (if genuine) the party making the order had or claimed a *right and interest in the goods*, or a power of *disposing of them*, and took upon him the right of transferring them as his own property, out of the custody of him who had the possession of them, to the person presenting such order; when in fact and in truth, he had no such right or power, with intent to deceive the party in possession of the goods.

Whereas, he said, the present order (if a genuine one) was no more *than a request* from *Evans* to *Coleman*, to deliver the goods to the bearer upon his, *Evans's*, credit, and that he would see him paid for them, which was not an order for goods under the statute; and in support of this position, he quoted *Mary Mitchell's* case, *Foster*, 119. in *Leach*, 90. which it was determined by ten judges, that a writing similar to the one under consideration, was not a warrant or order within the meaning of the act of *Geo.* II. against forgery; only a request to let her have the articles mentioned in the writing, and that they should be paid for: this he said, might be considered only as a collateral undertaking, that if *Coleman* would let the bearer have the goods, he would see them paid for.

That from the terms of the order in question, it would appear that *Evans* had a credit with *Coleman* in *Camden*, and had been in the habit of getting goods from him on credit as a customer, and only requested him as a favour to let the bearer have the goods; from this view of the subject, therefore, he contended, that this could not be considered as a forgery within the meaning of the act, especially as no injury was done, the goods having never been delivered; if then no injury was done, no offence was committed. *Salk.* 375.

2. Whatever the opinion of the court might be on the first ground he had taken, he had very little doubt of success on this second ground; as he conceived the indictment to be radically defective. Certainty, he observed, was the

The State v. Holly.

life of the law; and in no case was it more essentially necessary, than in a case where the life of a man was concerned. It ought to set forth with sufficient certainty, not only the nature of the offence, but also the law against which the offence was committed, in order that the prisoner might know how to defend himself against the charge, and the court the nature and extent of the punishment, in case of conviction. That the indictment in this case, states the offence to be against "*a British act of parliament made* "*of force in this state;*" when in fact, there never was any such *British* statute made of force in *South Carolina;* for although in the preamble of an act against forgery, it would seem, as if the legislature meant and intended to make the *British* act of parliament against forgery of force in this country; yet they evidently abandoned the idea, and passed an act under the legislative authority of *South Carolina*, against such offence; and the offence in this indictment, if any has been committed, is not stated to be against the *act of assembly of South Carolina*, but against *a British act of parliament*, which never was *extended to*, or *of force in this country;* consequently, if there was no such *British* act of parliament in force against this offence, there could be no transgression of it; and if no transgression of it, then there can be no punishment under it; he therefore prayed the court, that the judgment might be arrested and the prisoner discharged.

Mr. Solicitor *James* opposed this motion, and insisted that the act was complete by the delivery of the order to *Coleman*, and demanding the goods; because it was then uttered within the meaning of the act, and sent into circulation, as, and for a true and genuine order. The prisoner had then done all that he could, to give currency to this forged order, with intent to deceive and defraud Mr. *Coleman* out of his goods. It is the parting with the possession of a forged instrument of any kind, that gives it utterance in law; and which completes the offence, within the meaning of the statute.

The State v. Holly.

The order itself was one, which came within the description of the warrant or order for goods contemplated by the statute, and within its true intent and meaning. There is no specific or express form necessary by this act; "it declares the *making* or *uttering* of any false, forged, or "counterfeit warrant, or order for payment of money, "or delivery of goods, a felony, if done with intention to "deceive or defraud any person whomsoever." It is no sort of consequence what the form or tenor of it may be, if it is false and calculated to deceive and defraud. It is this which constitutes the offence of forgery. If this order had been genuine, and *Coleman* had delivered the goods, there is no question but *Evans* would have been liable, and must have paid for them. But, on the other hand, as the order was not a true one, if *Coleman* had delivered the goods on the credit of the paper writing, he would have been deceived and defrauded by it; this offence then was both within the mischief and the words of the act itself. He then relied on *West's* case, tried in *Charleston* in 1785, who forged an order in the name of *William Washington*, on *James Gregory*, for the delivery of goods; the prisoner was indicted under this act, and convicted, but was afterwards pardoned by the governor. The solicitor next contended, that it was verimmaterial, whether the goods were delivered or not; for it was not essentially necessary by this act, that the money should be actually paid, or the goods delivered, in order to constitute this offence; the bare uttering or delivering the order for payment or delivery was sufficient.

As to the second objection against the indictment, he said the offence was sufficiently certain and well described, according to approved legal precedents; and as to the conclusion of its being against an act of parliament made of force in this country, it was well known that the act against forgery in this state, was a transcript of the *British* act of parliament against forgery, passed in the second and seventh years of the reign of *George* II. while this was a *British* colony; and it was very immaterial, whether the then legislature of the country, declared the same to be of force in

The State v. Holly.

South Carolina, or re-enacted the clauses *in totidem verbis*; the offence was the same in either case; and the court could be at no loss, for the nature and extent of the punishment, being declared a felony without benefit of clergy.

The Judges, after considering the case fully, were unanimously of opinion, that the making and presenting the order in this case, came within the meaning of the act, and constituted the offence of forgery. That no particular or precise form was necessary; that it was sufficient, if it was false and forged, and calculated to deceive and defraud. That it was not necessary, that the goods should be delivered in order to complete the offence; the presenting of the order and handing of it to *Coleman*, was an *uttering* within the words of the law, although stopped by *Coleman* on suspicion of its falsity; and that *West's* case, tried in *Charleston* in 1785, had settled the doctrine in this state. The order in that case was positive, and the goods were desired to be charged to the account of *William Washington*, the supposed drawer of the order; so in the present case, the order is positive also, and the goods are desired to be charged to *Charles Evans*, the supposed drawer; there is no ambiguity or uncertainty in either of the cases.

In *Mary Mitchell's* case, quoted from *Foster*, there was a doubt whether it was a *request*, or an *order within the statute*: "*Let the woman have* (*the things mentioned*) *and he* "(*the supposed signer of the paper*) *would see them all paid.*" This appeared to the judges a *doubtful case*, and the statute being a highly penal one, the majority of them gave it the mildest construction, though one or two of them thought it came under the statute.

But on the second ground, they were all of opinion, that the judgment ought to be arrested; the indictment states the offence to be against the *British* statute made of force in this state, when in fact there is no such statute made of force here. If the indictment had concluded against the act of the legislature, in such case made and provided, it would have been good; but as it concludes against a *Bri-*

tish act of parliament, which never was in force in this country, it is vitious, and the court cannot by intendment say that the *British* act of parliament intended to have been made of force here, means an act of assembly against the offence of forgery.

In all prosecutions on penal statutes, especially where the life of a man is concerned, nothing should be left to intendment, or presumption in the pleadings; every thing in them should be precise, certain and definite, so as to leave no room for uncertainty or ambiguity.

Rule for arresting of the judgment made absolute, and the prisoner was discharged.

Present, WATIES, BAY, JOHNSON, RAMSAY and TREZEVANT.

THE STATE *against* HARDY HARDING.

Columbia, 1800.

HORSE-STEALING.

A case tried before Mr. Justice RAMSAY, in *Pendleton* district, where the prisoner was convicted of the offence.

He was ordered down to *Columbia*, in order to be present at the argument on a motion for a new trial on his behalf.

Mr. *Gist*, on the part of the prisoner, moved for a new trial on three grounds.

1. Misconduct on the part of the foreman of the jury who tried the cause, in saying before the trial, "By God "he was one of the jury who was to try the prisoner, and "he would hang him at all events."

2. That he had discovered new evidence since the trial, which, if it had been produced, would have evinced the prisoner's innocence.

The integrity of a juryman shall never be impeached by an affidavit, unless a copy of it has been duly served on him, that he might have an opportunity of exculpating himself.

The discovery of new evidence after trial and conviction, not a good ground for a new trial.

The State v. Harding.

3. That the evidence offered to the jury, was not sufficient to warrant the conviction.

After hearing the arguments of the counsel on all the different points, the judges were unanimously of opinion, on the first ground, that no affidavit should be received on a motion of this kind, to call in question the integrity of a juryman, or impeach his verdict, unless a copy of it had been served upon him, before the rising of the court; as had been laid down in *Duestae's* case, for murder, *ante*, vol. 1. p. 377. *Riley's* edit. and also in *Simpson's* case, who was tried for negro-stealing at *Camden*; in order that such juryman might have an opportunity of exculpating himself, or otherwise satisfying the court, that he had not been guilty of any such misconduct as he had been charged with; and this was due, as well to the character of the jurors of the country, as to the cause of justice itself.

Secondly. That the discovery of new evidence after trial, (which is so frequently made a ground on motions for new trials,) was not a good ground for a new trial; because, on a sufficient affidavit of the absence of witnesses in criminal, as well as in civil cases, the court will always postpone the trial in order to give the prisoner an opportunity to procure their attendance, and be better prepared at the next court; and that it might have a very mischievous tendency, to establish a precedent of this kind, after a trial and conviction, and after all the evidence on the part of the state had been fully disclosed; as it was easy to foresee, that a man whose life was in danger, would in every case, even to gain time, make use of a pretext of this kind to create delay; but more especially by the assistance of confederates, he might be enabled to procure unprincipled men to be witnesses, to contradict the evidence on the part of the state, and thereby defeat the ends of justice.

See the case of *Drayton* v. *Thompson*, *ante*, vol. 1. p. 263. *Riley's* edit.

Thirdly. That as the judge who tried the cause, had reported from his notes that the evidence was very strong against the prisoner, there was not the least shadow of reason for granting a new trial on that ground.

The motion for a new trial, was therefore refused, on all the grounds. The State v. Harding.

After which, sentence of death was pronounced by the judge who tried the prisoner, he was remanded back to the gaol of *Pendleton*, and was executed agreeably to his sentence.

Present, WATIES, BAY, JOHNSON, RAMSAY and TREZEVANT.

POURIE and DAWSON *against* The Rev. HUGH FRASER. *Charleston District*, 1800.

ASSUMPSIT for goods sold, &c. 96*l.* sterling. Tried at *Georgetown*, *April*, 1800, before BAY, J.

In this case it appeared, that *Pourie*, one of the plaintiffs, did business as a factor, in the sale and disposal of crops, &c. independent of the mercantile transactions of the house of *Pourie and Dawson*; and that the defendant had consigned rice to him for sale, to a much larger amount than the debt claimed in this suit; and that while the rice was in his hands, he took up goods from the house of *Pourie and Dawson*, to the amount of 96*l.* which he sent to the defendant *Fraser*. That some time afterwards, *Fraser* and *Pourie* came to a settlement about the rice, and *Pourie* gave his bond for the balance of the proceeds to *Fraser*; but in this settlement, this 96*l.* was not carried into the account. *Pourie*, in a short time subsequent to this settlement became insolvent, and took the benefit of the insolvent debtors' act. Whereupon, Mr. *Dawson*, the solvent copartner, instituted this suit for recovery of this account entered in the books of *Pourie and Dawson*.

The defence set up in this case, was, that *Fraser* had never authorized *Pourie* to take up goods in his name from

A planter sending rice to a factor for sale, and to send him goods, will not authorize the factor to take up goods in his name and on his account from a merchant, unless specially authorized for that purpose; though a planter may by a subsequent act ratify such contract made by his factor with a merchant for goods. But an omission of such merchants' account in a settlement between a planter and his factor will not amount to any such ratification of the contract with the merchant.

Pourie and Dawson v. Fraser.

any person or persons whatsoever. That it was true, he had sent him his crop of rice for sale, and had ordered him to send him up the articles mentioned in the account, which he intended should be paid for out of the proceeds of the rice; but never had it in contemplation, that his factor should run him in debt, or pledge his credit with any person, or to any amount whatever; and that the omission to give credit for the amount of this account, when he took *Pourie's* bond, was a mistake in the hurry of settling a long account which had subsisted between them.

The jury, under the direction of the judge, gave a verdict for the defendant; and this was a motion for a new trial, on the ground of misdirection, and as a verdict against law.

Mr. *Gaillard*, in favour of the motion, insisted, that the credit was given to *Fraser* by the house of *Pourie and Dawson*, and the entries in their books proved it; and it was not denied, but that the goods went into *Fraser's* possession. That the entries in merchants' and tradesmen's books had long been admitted as evidence of the contract between them and their customers in this country, under the act of assembly; and this case ought not to be an exception to that rule. That *Fraser* himself, by his settlement with *Pourie*, and taking his bond for the balance of the sales of his rice, had confirmed this contract, if any doubt could arise on that head before, by not taking it into the account on that settlement.

That *Fraser* had afterwards sued *Pourie* on this bond, which reduced him to insolvency; and obliged him to take the benefit of the insolvent debtors' act, which was in law a release of the debt.

Mr. *Deas*, for defendant, in reply, admitted the general doctrine, that entries in merchants' and tradesmen's books were evidences of contracts in this country, where customers were in the habits of dealing with them. But this was a case of a very different complexion. Here the ac-

count was opened between *Pourie and Dawson* and the defendant, at the instance and request of *Pourie*, the factor of *Fraser;* and here he said, a very important question presented itself to the view of the court; had he any authority to open this account with the house of *Pourie and Dawson?* It was not pretended on the trial, nor is now, that he had any express authority so to do. Will then his acting as a factor in the sale and disposal of rice, or other produce of the country, give this authority to a factor? He was bold to say, it would not; and it would be a very mischievous doctrine if it did. The law relating to principals and factors would warrant no such thing, unless some special power was given for that purpose. The credit of the planters in this country, it was well known, stood very high; and to permit factors to speculate upon that credit as they pleased, while they pocketed the money of their employers, would indeed prostrate the interests of the planters at the feet of their agents, the factors.

That what was called a subsequent ratification in this case, the omission to credit this account when the settlement took place, and the bond was given for the balance of the proceeds of the rice *Pourie* had sold; that appears to be a mistake or an omission in the hurry of business, which his client was willing and ready to rectify at any time, by giving credit on the bond for that amount; be that however as it may, *Pourie and Dawson* had nothing to do with it, as they were no parties to the transaction.

By the Court. Where a factor is authorized generally to transact all the business of a planter, as to buying and selling for the use and account of a plantation, in such case the act of the factor will bind his principal. But if a factor is employed to sell rice or other produce, and to send goods to his principal, he cannot bind him by taking up goods for his principal, and the merchant who trusts him must look to the factor for his money.

If, however, a planter was by any subsequent act to ratify such a contract, it would be a strong presumptive evidence

Fourie and Dawson v. Fraser.

that he had been so authorized to make it, and would be binding on the principal; but the omission or mistake in an item in the settlement of accounts between the factor and his principal, will not amount to any such ratification of a contract with a third person.

Let the rule for a new trial be discharged.

Present, GRIMKE, BAY, JOHNSON and TREZEVANT.

Charleston District, 1800.

WILLIAM STEPHEN *against* WILLIAMS THAYER.

It is the writ of attachment, and not the judgment obtained on it, which gives the lien on the absent debtor's goods, &c.

If the declaration in attachment is filed after the expiration of two months, but before the end of the year and day, it will preserve the first attaching creditor's *lien* unless the second attaching creditor shall rule the first one to declare and in default non-suit him.

A judge's order for the substitution of a new writ of attachment, in lieu of an old one lost or mislaid, is tantamount to an order for further time to declare.

CASE on attachment.

Upon a rule on the sheriff, to shew cause why he should not pay over monies, arising from the sale of a house and lot, to the plaintiff in attachment, as the first attaching creditor.

Present, GRIMKE, WATIES, BAY, JOHNSON and TREZEVANT.

This was a case which turned upon the construction of the attachment act. Mr. *Taylor*, as attorney for the plaintiff in this suit, moved that the money arising from the sale of this house and lot, might be paid over to his client as the *first attaching creditor*.

Mr. *Darrell*, attorney for one *John Rogers*, who was a second attaching creditor, claimed this money, and moved that it might be paid over to his client, as having the *first judgment*.

Stephen Thayer.

Upon looking over the proceedings, it appeared that Mr. *Taylor* had issued out his attachment on the 6th day of *July*, 1796, but as the sheriff had mislaid the writ of attachment, the declaration was not filed within two months after the issuing of the writ. On the 22d of *June*, 1797, Mr. *Taylor* obtained an order for the substitution of a new writ of attachment, in lieu of the old one lost or mislaid; on the 20th of *July*, 1797, he filed his declaration; on the 31st of *July*, 1798, he obtained an order for judgment; on the 2d of *August*, 1798, he executed his writ of inquiry, and on the 20th of *August*, 1798, he got his final judgment signed.

Mr. *Darrell* issued his writ on the 6th of *October*, 1796, filed his declaration the 31st of *January*, 1797, obtained an order for judgment on the 5th of *February*, 1798, and executed his writ of inquiry, and signed his judgment on the 26th of *March*, 1798, nearly five months before Mr. *Taylor's* final judgment; so that the great question in this case was, who should have the preference, the *first attaching creditor*, or the *first judgment creditor*.

On the part of *Rogers*, the second attaching creditor, it was contended, that the main object of the attachment act, and the attaching a part of the absent debtor's goods, &c. was to make the absent debtor a party in court, so as to bind him with a judgment, as in ordinary and common cases, where a copy of a writ or process was left at the defendant's most notorious place of abode; but that the judgment when obtained, operated by common law principles, and bound the property real and personal of the absent debtor, and had all legal priorities in the same manner as if defendant had been served personally with the original process, or as if it had been left at his usual residence. It was admitted, that the first attaching creditor would have had the preference if he had been diligent and obtained his first judgment; but as he did not, but lay by, it left an opening for Mr. *Rogers* to step in and get the first judgment; by which means *Stephen* lost, and *Rogers* gained the priority.

Stephen v. Thayer.

That *Stephen* should have filed his declaration within two months after the return of the writ, which was on the third *Tuesday* in *August* next after it was issued; that if the sheriff did not return the writ, he should have been ruled to that purpose, and if on being called on, he had shewed for cause that it was lost or mislaid, he might then have got an order of substitution as well as in *June*, 1797, which was such a neglect or omission as forfeited his right to a preference.

Mr. *Moultrie* claimed the money for his client, Mr. *Stephen*, the first attaching creditor, on the ground that this was not a common law right, but one expresly given by the statute, which was bottomed on the civil law; the proceedings were *in rem* and not *ad personam*; that the main end and design of it was not so much to bind the person of the absent debtor, and to make him liable, as to get possession of his goods and chattels to satisfy the demand of the plaintiff. The very title of the act, and all the clauses of it, were predicated upon this idea. The act at the first blush, presumes that the defendant is absent and out of the state, so that a common law process could not be served upon him, but that he had goods and chattels, rights and credits within its limits sufficient to satisfy the demand. It was therefore to make these liable in the absence of the defendant that the act was framed, and every clause of it is so constructed, as to answer the ends contemplated.

The first clause of the act is express and positive; it declares that the attaching of any part of the absent debtor's goods and chattels, &c. &c. in the name of the whole, *shall secure the whole*, and make it liable *in law*, to *answer any judgment* which should be recovered *upon such process*; this, he contended, was a statutory assignment, or transfer to all intents and purposes, as effectually in law as if the defendant himself had made a formal assignment under hand and seal, or given a mortgage of the property to secure the debt. It was much more extensive in its operation than any judgment or execution, as the latter can only extend

to tangible property which the sheriff could seize and sell, but this statutory transfer under the act, gives the plaintiff in attachment a right to moneys in the hands of third persons, and to bonds, notes, book debts, and all other kinds of *choses in action* which belong to the absent debtor.

It also compels a discovery on oath, of all such debts, dues and demands from third persons, as are due and owing to the absent debtor. It likewise authorizes the attaching creditor, to sue for, recover and receive all such moneys as are due and owing to the absent debtor, and to give receipts and acquittances for the same, which are declared to be binding and conclusive against all parties whatever; no assignment, therefore, he said, could be more conclusive or extensive than this created by this act, yet none of them so far depended on the judgment. This act likewise authorizes the sheriff to seize and take into his power all the tangible property of the absent debtor, and appraise and sell the same, and pay the proceeds into the hands of the plaintiff in attachment, and this also without any judgment; all which extensive and operative clauses in this act, he said, prove most manifestly beyond all contradiction, that it is the issuing out and lodging of this attachment in the hands of the sheriff which creates and establishes this extensive lien on the goods and chattels, rights and credits of the absent debtor; because all this is done under the different clauses of the act, long before any judgment oftentimes can be obtained against the absent debtor. Indeed, the end and design of getting final judgment in an attachment case, was more for preventing fraudulent demands against an absent debtor, than for any other purpose whatever; because the act requires that such debts and demands shall be proved to the satisfaction of a jury by the ordinary rules of evidence, and that after a notice of a year and a day to defendant to come in and plead to the suit, in order to prevent surprise in establishing a demand against the absent debtor; but this judgment seems intended only to liquidate and establish the amount of the plaintiff's demand, but not to give him a right to the absent debtor's effects,

Stephen v. Thayer.

which had been previously disposed of for the use of the plaintiff in attachment, agreeably to the foregoing clauses of the act.

With regard to the supposed *laches* on the part of *Stephen*, in not filing his declaration within two months after the return of the writ of attachment, it did not deprive him of any right which he had acquired by his first attachment; the suit was not discontinued thereby, and if the suit was not discontinued, then the first attachment did not lose its lien. He admitted, that the second clause of the attachment act, did require a plaintiff to file his declaration within two months after the return of the writ, unless sufficient cause was shewn to the contrary. Now the cause shewn here, was the *loss of the original writ by the sheriff*, which was deemed a good cause for further time to file it; and this was no *laches* or neglect on the part of Mr. *Stephen* the plaintiff, or his attorney Mr. *Taylor*, but owing to an accident happening to the sheriff, who is a public officer, and unavoidable accidents are always allowed to take cases out of any general rule.

The act has fixed no precise time for filing a declaration after the expiration of two months; that is left entirely to the *discretion* of the judge, who makes the order for further time. If, then, no time is mentioned, either by the act or any rule of court, which allows a year and a day before the cause is out of court, unless the party was forced by a rule to declare in a shorter time, and it is not alleged in this case, that any such rule was ever obtained, either by the defendant or the second attaching creditor; and long before a year and a day had expired from the return of the writ, the order for substituting a new writ in lieu of the one lost by the sheriff was obtained, which he said fully cured all defects and omissions about filing this declaration; and the party immediately afterwards filed his declaration, and proceeded on regularly to final judgment. But whatever cause there might have been for taking advantage of any delay while the proceedings were *in transitu*, it was now too late after judgment. 1 *Bac.* 95. 3 *Burr.* 1725. 1728.

The statute of jeofails will cure all omissions or mistakes, if there were any, after verdict and judgment.

After considering this case, the opinion of the majority of the judges, was delivered by Mr. Justice JOHNSON, to the following effect. That the process of attachment had both the operations contended for; that it was the intention of the act, to secure the property of the absent debtor, for the satisfaction of the plaintiff's demand, and also to make the absent debtor a party in court, so as to bind him by a judgment; but it was evident from the whole tenor of the act, that it was the *process of attachment* which gave the *lien* on defendant's goods and chattels, &c. in the first place, and *not the judgment;* the words of the act in most of its clauses speak this language and convey this idea in almost every part of them.

The words in the first clause expressly declare, *that the attaching* of *any part* in the name of the whole, *shall make the whole* liable in law to answer any judgment which may be obtained on that process; or in other words, liable to satisfy the plaintiff whatever sum he could prove to a jury to be justly due him.

The third clause enacts, that the goods attached should be delivered over to the plaintiff, after being inventoried and appraised, to be sold towards payment of his debt.

The fourth clause authorizes the plaintiff to sue for bonds, notes and accounts, and other *choses in action* due to the absent debtor from third persons, and to give receipts and discharges in law for the same; which are to be considered as good and valid to all intents and purposes whatever, and in fact to do all the acts of an absolute assignee.

This attachment really puts the plaintiff on the footing of a judgment creditor, (only it is more extensive in its operation, as to *choses in action*, than any execution could put him,) by authorizing the sale of all tangible property for the plaintiff's debt, in addition to the recovery of all *choses in action;* and all these rights are given previous to any judg-

Stephen v. Thayer.

ment being entered up, all which clearly prove, that it is the attachment which gives the lien, and not the judgment.

With respect to the forfeiture of this right by the plaintiff's not filing his declaration within two months, it would be contrary to the rules of law and justice, to suffer a man to lose a priority, or previous right, by any circumstances which he himself could not control; such as a debt being unliquidated, owing to the absence of a material witness, or the like, which might prevent a man from obtaining a judgment as soon as a subsequent creditor; or as in the present case, the misfortune or omission of the sheriff in not doing his duty, in returning the writ in due time, &c. by which circumstances, a plaintiff might be delayed in getting his judgment, without any default of his own. It has already been observed, that the absent debtor was made a party in court as effectually as if he had been served with a *capias ad respondendum;* if so, then the suit must be governed by common law rules, where it is not controlled by the act. The plaintiff's suit, therefore, is not abated by the common law until the expiration of the year and day after the return. Against this construction there is no express authority; the only thing against it, is the implication arising out of the second clause of the act, which says the declaration shall be filed within two months after the return of the attachment; but there is nothing in this clause, or any other clause, which says the suit shall abate, if the plaintiff does not file his declaration within two months; and it is a well established maxim, that the common law is not to be altered or destroyed by implication. According to this construction, therefore, the plaintiff was within the rules of the common law, in filing his declaration before the expiration of the year and day after the return. There are several acts of our legislature which are analogous to the one under consideration, and in their construction, will throw light upon this subject. The circuit court act of 1789, says, all the pleadings shall be made up at the first court, and be ready for trial at the next court. The circuit

court act of 1791, says, the declaration shall be filed on or before the meeting of the second court; yet under neither of these acts was it ever contended, that the suit abated, or that the plaintiff was precluded from filing his declaration after the time required by these acts, at any time before the expiration of the year and day: indeed, if the defendant wished for a speedy end of the suit, he might have forced the plaintiff by a rule to declare, and if he did not then do it within the rule, then the defendant might have *non-prossed* him. And was there any thing to have prevented the second attaching creditor in this case, from ruling the first attaching creditor to file his declaration? in which case, he might have *nonprossed* him unless good cause had been shewn to the contrary; but he did not take this step, which afforded the plaintiff the advantage of the year and day to file his declaration; and it is too late after verdict and judgment to avail himself of any neglect of that kind.

Admitting, however, that the strict and rigid construction contended for, under the clause of the act, was a true one, the cause assigned by the sheriff in losing the original writ was a good one, and would have brought the plaintiff's case under the exception mentioned in the second clause, "unless sufficient cause is shewn to the contrary "for a longer time." There is no judge on the bench, who would not, upon such a representation, have given further time to declare, and the order of substitution, which was given for leave to substitute a new writ in lieu of the one lost by the sheriff, may be considered as tantamount to leave given for further time to declare, as it could be for no other purpose that the order was made; and the two months to declare, might with great propriety have been considered from that time; and from that period, all the proceedings are conformable to the directions of the act.

It was therefore ordered, that the money in the sheriff's hands, be paid over to Mr. *Stephen*, the first attaching creditor.

Stephen v. Thayer.

WATTS, J. dissented from this opinion, and differed from the other judges on the point of the lien created by the act; as he conceived it was the judgment which consummated the lien, and not the attachment; consequently, that the first judgment creditor should have the priority.

Charleston District, 1800.

THOMAS DILLON *against* ——— M'CUE.

In the summary jurisdiction of this court, where a defendant wishes to have benefit of the plaintiff's answers to points on oath, he must give notice in writing, specifying the points he wishes to have the answers to.

MOTION to set aside a nonsuit, on a summary process.

In this case, Mr. *Parker*, who appeared for defendant, filed a discount; but as a knowledge of the items in the discount, and some other material circumstances, rested only with the parties, he gave the plaintiff's attorney, Mr. *Taylor*, notice that he would call on the plaintiff on the trial to answer on oath touching the payment of certain sums of money, which were known only to the parties themselves; upon the ground, that in the equity side of this court, in small causes under 20*l.* sterling, upon summary process, where there was no occasion for a jury, the parties had a right to all the advantages on both sides, as they could have in a court of equity; and this was in nature of a cross bill, where there was no other relief than the parties on oath. Upon the trial, the plaintiff did not appear to answer on oath the questions propounded, whereupon he was nonsuited.

This was a motion to set aside this nonsuit, and to have a new trial.

Mr. *Taylor*, for the plaintiff, did not deny the right of the defendant, to call upon the plaintiff for an answer on oath in the summary jurisdiction of this court, in cases where there was no other testimony to be had; but contended, that as this was a mere verbal notice out of doors,

neither himself nor his client was bound to take notice of it.

Dillon v. M'Cue.

As this was a new point, the judges took this opportunity of expressing their opinions of the case, and of what ought to be the practice in such cases as the present one in future. That as to the principle contended for by Mr. *Parker*, it was a correct one; for each party in the summary jurisdiction of this court under 20*l.* sterling, had a right to avail themselves of all matters both in *law* and *equity*; that is, as long as common law rules of evidence will bear them out, they ought to be bound by the common law rules in the first place; and where they fail, that the parties may then resort to equitable principles, to supply the defects of the common law. That where there is no other evidence to be procured, the defendant has a right to call upon the plaintiff to answer on oath, touching any matter known only to the parties themselves; and if the plaintiff refuses to answer, then to take the matter *pro confesso*, or to move for a nonsuit, as the case may be; but that loose, verbal notices were by no means sufficient for that purpose. In every case, therefore, where a defendant wished to avail himself of such kind of testimony, or answers from the plaintiff, he ought at the time of filing his discount to give the plaintiff notice in writing, that he would call upon him for answers on oath to the points he wished to make him answer unto, specifying them, particularly, in order to guard against surprise.

As the practice, however, had not heretofore been settled on this head, they thought it but reasonable to give the plaintiff another hearing.

Rule for a new trial made absolute.

Present, BURKE, WATIES and BAY.

☞ The above may be considered as a rule of practice rather than as an adjudged case.

Dillon v. M'Cue.

N. B. This case ought to have been placed among the causes in 1799, before Judge BURKE left the common law bench, but by accident it was omitted in its proper place.

Charleston, May, 1800.

THE COMMISSIONERS OF THE STREETS OF GEORGETOWN *against* ARCHIBALD TAYLOR.

MOTION for new trial.

This was an action to try title to certain portions of land within the defendant's enclosure near *Georgetown*, claimed by the commissioners as part of the public streets belonging to the town; tried before BAY, J. in *Georgetown*, *April*, 1800.

To constitute a public street or highway, it is necessary that it should be laid off and used as such; for it is the *use* which makes it a highway.

Nonuser, however, for a great number of years will forfeit a right to a highway.

The proper remedy for obstructing a street or highway is *by indictment*, and not by action to try title, which is a remedy to recover a private right.

Where the commissioners of streets or highways bring a private action for obstructing a highway, it is a good ground for demurrer, or in arrest of judgment.

The commissioners, in support of this right, produced a deed dated in 1734, from a Mr. *Screven* to certain trustees therein named, for the greatest part of the lands on which *Georgetown* is now situated and established; to be laid out in lots for the then and future inhabitants of said town. Afterwards, Mr. *Cleeland*, an old inhabitant in the vicinity of the town claimed this land, which Mr. *Screven* had so conveyed to trustees in right of his wife; but soon after compromised the matter with Mr. *Screven* and the lot owners, and confirmed all the titles from Mr. *Screven* to the proprietors of the lots, in and by a deed dated in 1737; and also conveyed all the rest of the town to trustees, in the manner and for the uses and purposes which Mr. *Screven* had done before him. Soon after this, Mr. *Cleeland* having other lands adjoining the town, laid out additional squares, and added them to *Georgetown*, which were to be considered as part of the said town; annexed to this deed laying off these new squares, was a plat on which were delineated these new squares with streets running through them in various directions, for the convenience of those who

might purchase the lots to be sold out in the different squares. But by a particular clause or proviso in this deed, declaring these squares to be a part of *Georgetown*, Mr. *Cleeland* reserved to himself the right or privilege of *selling or disposing of these squares in such manner* as he might *think proper*, exempt from all *provisoes* and *conditions whatever*.

Commissioners v. Taylor.

It was upon this deed, and the plat annexed to it, that the commissioners founded their claim to the streets, in that part of the town laid off by Mr. *Cleeland*. They admitted, that Mr. *Cleeland* had a right to dispose of the squares in any manner he pleased, agreeably to the proviso or condition in his deed; but denied his right to *resume the streets* which had been delineated on the plat annexed to it, as they were not mentioned in the proviso; and insisted upon it, that as he had once parted with his right in them for the use of the inhabitants, or for public purposes, he never could again resume them, or dispose of, or appropriate them to private purposes.

On the part of the defendant, it was urged, that the proviso or condition in this deed from Mr. *Cleeland*, expressly gave him a right of disposing of the squares as he pleased, whenever he thought proper; and as the streets laid down in this plat, were only intended for the use of those who should purchase the lots on the squares, and for no other purpose whatever, it was contended, that they were mere appendages or appurtenances belonging to the squares, and went with them whenever he thought proper, in the same manner as the squares themselves; and the more especially, as no lots had ever been laid off or sold out of any of these squares, and as a necessary consequence, there were no persons who had a right to claim the use of these streets. That Mr. *Cleeland* accordingly viewing the thing in this light, and believing himself perfectly secure under the proviso in this deed, and that he was well warranted in so doing, did by deeds of conveyance some time in the year 1753, sell and convey to *Mary La Roach*, in consideration of 817*l.* currency, two of the squares mentioned in his for-

Commissioners v. Taylor.

mer deed, without taking any notice of the streets, which were included in the deed with the squares.

The will of *Mary La Roach* was then produced, in which she devises her estate to her two daughters, Mrs. *Taylor* and another. Upon the division of her estate by commissioners appointed by the court of common pleas, under the act of assembly for that purpose, the squares in question fell to the share of Mrs. *Taylor*, wife of the defendant.

Several old witnesses were called, and sundry depositions were read, and they all proved that Mrs. *La Roach* had enclosed these squares, and that this enclosure had been used by her, and those claiming under her, as a farm and a pasture for more than forty years last past; and that after Mrs. *La Roach's* death, and the partition above mentioned, Mr. *Taylor* the defendant, entered into the premises in the year 1787, and has been in possession ever since. The substance of the testimony offered was as follows:

Mrs. *Gough* recollected a ditch and fence round the enclosure thirty-eight years ago, and it was then called *La Roach's* pasture.

Mrs. *Heriot* recollected a fence round it upwards of forty years ago, and it was then called *La Roach's* pasture.

John Cogdell proved that Mrs. *La Roach* paid him, as tax collector, the taxes for this enclosure before the *American* war.

William Heriot rented it of Mrs. *La Roach* before the war, and held it as her tenant from 1772 till 1780; it had been enclosed before, and part of it was enclosed when he leased it.

Samuel Smith recollected a fence round it forty years ago; it was a post and rail fence; the boys used to run through it.

Samuel Wragg recollected a ditch round it in 1763, and it had evident marks of having been enclosed as private property.

Donald Taylor proved that the present fence was put up in 1787, by the defendant, who has held and occupied it ever since.

The defendant here rested his claim, having, as he conceived, proved his right to the freehold, and also a possessory right under the statute of limitations.

Mr. *Gaillard* and Mr. *Keith*, on behalf of the commissions, argued, that whatever right Mr. *Cleeland* had to the squares, he had none to the streets, which had been given away for the use of the inhabitants of *Georgetown*. That the statute of limitations would not run against a street or a highway. That shutting up a highway was a nuisance, and every continuance of it was a nuisance also. *5 Bac.* title *Nuisance*, 57. and that it was the duty of the commissioners to see that they were removed, and all obstacles cleared away.

The *Attorney-General* and Mr. *Rothmahler*. A donor may prescribe what terms and conditions he pleases; and where it is intended as a benefit for himself or family, it shall in case of a dispute be construed most beneficially for his or their benefit. These streets and squares were undoubtedly all laid off for the benefit of Mr. *Cleeland*; and if he thought proper to relinquish that benefit, and appropriate that soil to other purposes, was there any thing in law or in this deed to prevent him? Surely not, even if the deed itself had been silent on the subject. But the reservation in the deed gave him this privilege expressly, which he accordingly exercised. They admitted, that the statute of limitations would not run against the use of a street or highway, which had been laid off and used for the purpose of public convenience; but, they said, although these streets were represented on paper, or on a plat annexed to *Cleeland's* own deed, yet they had never been laid out as streets, or used as such. From the year 1737 to the present day they had been included with planting and pasture grounds, and no witness ever saw or proved, that any one single inch of the space represented on that plat had ever been used as a street or highway. These streets, however, were originally intended as appendages to the lots, which were in-

Commissioners v. Taylor.

tended to have been laid out in these squares, and for the benefit of the lot owners, or persons who might purchase those lots; but as no lots were ever laid off or sold, they reverted with the squares, for the convenience of which they were at the time of executing the deed intended: and if any doubt could arise on this head, upon the construction of this deed, it ought to be construed most beneficially for the advantage of the donor, or those claiming under him.

Taking the commissioners after all upon their own ground, "that these streets were intended for the general "convenience of the inhabitants of *Georgetown*," and not for the convenience and use of the purchasers of lots in those new squares, still, they contended, that the right *was forfeited* and *gone;* for it is a well known rule of law, *that nonuser*, as well as *misuser*, will forfeit a corporate right. *Nonuser* for twenty years will forfeit a corporate right, on the ground that the corporation *hath no occasion for the exercise of such a right;* and the nonuser is the strongest proof that the corporation had no need of it, and did not think it worth their acceptance. In such case the right would revert back to the original donor, like land given to a corporation which becomes dissolved; in which case it reverts back to the original donor: *for the law annexes such a condition to every grant to a body politic.*

Twenty years possession is sufficient to give a title in ejectment, on which plaintiff may recover, 2 *Esp.* 636. and so *vice versa* twenty years omission to exercise a right will forfeit it.
Co. Litt. 13.
1 *Roll.* 816.
1 *Bac.* 510.

If Mr. *Cleeland* had reserved a rent, or charged the donation to the corporation of *Georgetown* with payment of it, and had sued for the recovery of it after so long a period, non-tenure would have been a good plea, or a nonuser, which is the same thing; which shews the reciprocity between the donors and donees, in a case of this kind.

But in the present case, there is a nonuser for more than forty years proved by almost all the witnesses, and a strong presumption, that no part of these supposed streets were ever made use of from the time of Mr. *Cleeland's* deed in 1737.

Therefore, in whatever light this case is viewed, either as a right which the donor might resume when he pleased,

*by virtue of the clause in his deed, or as a gift to *Georgetown*, which the inhabitants never accepted or made use of, it is very clear that the corporation of *Georgetown* at this day have no right to recover; and consequently, that a verdict should be for the defendant. Commissioners v. Taylor.

The presiding judge, in his charge to the jury, mentioned that it was their duty in the first place, to determine whether Mr. *Cleeland*, in making this deed, intended to reserve the right of resuming those streets laid down in the plan, as well as the squares, whenever he should think proper, or not; and if it should be their opinion that such was his original intention when he made the deed, (which they would have out with them,) and that those streets were only intended for the convenience of such persons as should purchase lots in these squares; or, in other words, as mere appendages to the squares, that then, and in such case, it would be their duty to find for defendant, who had proved a very clear title down from Mr. *Cleeland*.

But if on the contrary it should appear to them, that these streets were intended as highways, for the general use and convenience of the inhabitants of *Georgetown*, or others who might have occasion to make use of them, then the next inquiry would be, whether they were ever laid out and used as highways, or not? for it is essential to constitute a highway, that it should not only be actually laid off, *but used as such;* for it is *the use* that consecrates it to the benefit of the public: and upon this point he was bold to say, that no proof had been given to prove either that they had been actually laid off, or *ever used as highways:* on the contrary, it appeared from indubitable testimony, that the whole had been enclosed and used as a farm either by Mr. *Cleeland*, or those who held under him, for more than forty years last past; and here he said the doctrine of *non-user* would apply, which would forfeit a corporate right, as well as *misuser*. Upon both grounds, therefore, he thought the defendant well entitled to a verdict.

Commissioners v. Taylor.

And the jury found for the defendant accordingly.

A motion was afterwards made for a new trial, on the ground of misdirection, which was ordered, to the end that this case should undergo a fuller and more satisfactory investigation, especially as a majority of the judges were of opinion, that the clauses in *Cleeland's* deed were involved in a good deal of obscurity and uncertainty.

Second Trial.*

This cause was tried at *Georgetown* a second time, before Grimke, J. in the *November* following, when a verdict was given for the commissioners.

After this second trial, a two-fold motion was made before the constitutional court of appeals.

1st. In arrest of judgment, on the ground that the commissioners of the streets of *Georgetown* could not maintain or support this action. And,

2d. That in case of failure on the first ground in arrest of judgment, then for a second new trial, as a verdict against law and evidence. Inasmuch, as the jury on this second trial found against the reservation in *Cleeland's* deed, which had been given in evidence on the second trial as well as on the first; by which he reserved to himself the power of resuming the land annexed to the old town, and selling it out in squares when he pleased; and *upon which, the judges when they ordered the new trial had expressed no opinion;* and, secondly, because no evidence had been offered on the second trial, to prove that the streets mentioned in *Cleeland's* plat annexed to the deed, ever had been used as highways by the inhabitants of *Georgetown.*

* This second case ought regularly to have been placed among the cases argued in 1803, but it was judged better to subjoin it to the first case, so as to make one continued report of the whole, than to make two disjointed reports of them.

The first ground taken on this second argument *in arrest of judgment*, was not insisted on in the opposition to the motion for a new trial on the first argument; because (as it was alleged) the defendant wished to meet this case on its real merits, and that all the circumstances should come fairly out respecting the land in question, for the satisfaction of the inhabitants of *Georgetown*. On the present occasion, however, the defendant thought proper to avail himself of every advantage which the law would afford or allow him in defence of his right.

In support of this motion in arrest of judgment, the *Attorney-General*, Mr. *Pringle*, on behalf of the defendant, insisted, that the commissioners of the streets had no right of freehold in these streets, and consequently could not maintain this action of trespass. That the action in its present form was not a mere possessory action, or a special action for obstructing the passage of a highway, but was an action to try the right of freehold or title to the land in dispute, which right never had been vested in the commissioners. That the defendant had taken no advantage of this defect in the former trials, by pleading the matter specially, or demurring, or even moving for a nonsuit on the plaintiffs' closing their testimony; because, he knew he could at last avail himself of it on the present motion in arrest of judgmen. 3 *Black.* 393. 1 *Cromp.* 327.

That *Cleeland*, by laying off these streets never parted with the right of soil or freehold; that still remained in him, although he had granted a right of passage along them; for the law is clear, that the dedication of a street for the use of the public, is not an absolute transfer of the soil, only the grant of a privilege as long as the public has occasion for it. 2 *Str.* 1004. 1 *Esp.* 390. Upon this radical and fundamental defect of title, they must fail, as the law will not bear them out. 1 *Burr.* 143. 146. The owner of the soil has a right to all above and under the ground, except only the right of passage to the public. There was still a further ground, he said, which rendered it impossible

Commissioners v. Taylor.

for the plaintiffs to recover in the present suit; for, although *Georgetown* has become a flourishing town, and is so at this day, yet it never was laid out by any public authority, nor had it even the semblance of a corporation till a very late period; therefore, as members of a corporate body, they cannot maintain this action. The first notice taken of *Georgetown* by the legislature after the revolution, was in an act passed in 1787, authorizing the public market, regulating the streets, and for other purposes of police mentioned in the said act. By this act, the commissioners of the streets are empowered to keep them clear and in good repair, and to cause annoyances to be removed, and all obstructions, under certain penalties therein mentioned; and the same powers were also given them, as had been given to the trustees mentioned in *Cleeland's* deed. By another act, passed in 1791, the commissioners are authorized to assess the inhabitants in a sum sufficient to keep the streets and causeys in repair, &c. but neither of these acts gave, or could give, any thing like a *freehold* to the commissioners.

But supposing, the most that can possibly be claimed by the commissioners on any ground whatever, that *Cleeland's* deed had given a *right of passage* to the trustees for the use of the inhabitants to and along these streets originally, and that the present commissioners were their legal and regular *successors in office*, the fee of the land would still have been in *Cleeland*, or those claiming under him, though the right of passage might have been in the inhabitants of *Georgetown;* this would never give them a right to support an action of ejectment or trespass, to support a title. Their real and *proper* remedy would have been *by indictment*, for obstructing *the use of these streets or highways*, and not by action of trespass to try title. 3 *Bac.* 668. 2 *Str.* 1004. To constitute a public highway, it must not only be laid off, but *used as such* by the inhabitants; this is the dedication of it to the public, for public uses; and for the obstruction of which, *an indictment is the appropriate and legal remedy;* because, it then becomes an *offence against the public*, and not a trespass on *private rights*. An indictment, therefore, is the only remedy in such cases, 3 *Bac.* 668.

1 Ld. *Raym.* 491. *Co. Litt.* 56. a. 2 *Roll.* 140, 141. 3 *Bac. Abr.* 668.

In case the court should order judgment to be entered up for the plaintiffs in this action, what would be the nature of it? Why, that the plaintiffs should recover their freehold, and damages for the use and detention; which would not be establishing a right for the public, but for themselves as individuals. Whereas, a judgment on an indictment for a nuisance, would be that the sheriff with the assistance of a *posse*, (if necessary) should remove the obstructions out of the highway, that passengers might pass and repass with convenience and safety; and in case of any opposition given to the sheriff, every individual would be liable to be indicted, fined and imprisoned.

This difference in the nature and effects in the civil and criminal jurisdiction of this court, most evidently points out the remedy which should and ought to have been pursued in this case. He therefore said, he would postpone any arguments in favour of the motion for a new trial, which was his second ground, and on which he felt himself strong, until he had heard the opinion of the court on this first point in arrest of judgment; as, if the court should be with him on that ground, it would preclude the necessity of any further argument.

The counsel for the plaintiffs took nearly the same grounds which had been taken on the two trials, with little or no variation; except, that in answer to the arguments in arrest of judgment, they contended, that the right of proceeding by indictment did not take away the right of the action of trespass; and that in case of judgment being entered up for the plaintiffs, they might still be considered as recovering in trust for the use of the inhabitants of *Georgetown*, and not in their own private rights.

The Judges, after fully considering this case, were unanimously of opinion, that the commissioners could not support the present action, to recover title and damages; as the right of freehold was never in them. But that the proper remedy for obstructing a street or highway, was by

Commissioners v. Taylor.

indictment for a nuisance; against which, however, *non-user* would be a good plea; for there was no proof on the second trial, any more than on the first, that ever these streets were actually laid off or opened, only delineated on paper; or that they were ever used as highways after *Cleeland* made the conveyance, on which this right was founded or claimed by the commissioners.

Rule made absolute for arresting the judgment.

Present, GRIMKE, WATIES, BAY, JOHNSON, and TREZEVANT.

CASES

ARGUED AND DETERMINED

IN THE

CONSTITUTIONAL COURT OF APPEALS,

OF THE

STATE OF SOUTH CAROLINA.

IN THE YEAR 1801.

HARRIET BERESFORD POAUG *ads.* CHRISTOPHER GADSDEN and others, claiming a distributive share of the estate of JOHN WRAGG, deceased, who died intestate. *Charleston, May,* 1801.

UPON a summons to shew cause why a writ of partition should not issue, to divide the intestate's estate among the petitioners, according to the act of the legislature, "for "the abolition of the rights of primogeniture, and the dis- "tribution of intestates' estates," &c.

In the construction of the act for the abolition of the rights of primogeniture and distribution of intestates' estates, passed in 1791, no distribution or right of representation is allowable among collaterals and grand nephews and nieces, of brothers and sisters of the intestate, are excluded.

The petitioners, *Christopher Gadsden*, in right of his wife, who was one of the sisters of *John Wragg* the intestate, and several others who were *brothers* and *sisters*, and

rals further down than brothers' and sisters' children. All grandchildren,

Poaug ads. Gadsden and others.

children of brothers and sisters of the said intestate, preferred their petition to the court of common pleas, praying for a division or partition of the said intestate's estate among them, agreeably to the terms of the above mentioned act. In consequence of which, the usual summons issued to Mrs. *Poaug*, the widow of *John Poaug*, deceased, a nephew of the intestate *John Wragg*, deceased, to shew cause, if any she had, why the said intestate's estate should not be divided among the petitioners, agreeably to the prayer of the petition.

Upon the return of this summons, Mrs. *Poaug* came in and shewed for cause, that she was entitled to one-sixth part of the said intestate's estate, in right of her son *John Poaug*, deceased, who died an infant; and who was the only child of *John Poaug*, her late husband, who was the only child of his mother *Charlotte Poaug*, deceased, who was one of the sisters of *John Wragg* the intestate. That the father, if alive, would have taken under the act the one-sixth part of the estate, the proportion which his mother would have been entitled to; and consequently, that his son would have been entitled to his father's share. And upon the death of her son, she, Mrs. *Poaug*, had an unquestionable right to the share her son would have taken if alive.

To this it was answered, on the part of the petitioners, that if Mrs. *Charlotte Poaug*, the sister of the intestate had been living, she would have been entitled to the one-sixth part of her brother's estate; or if her son, the late husband of the claimant had been alive, he would have taken his mother's share; but as they both died before the intestate, the act did not carry the right of distribution further down than to the nephew of the intestate. In that event, that sixth part which the nephew would have taken, went back to, and formed a part of, the aggregate of the intestate's estate; which was then to be divided into five equal parts, and to be distributed among the surviving brothers and sisters, and the surviving children of the deceased brothers and sisters, agreeably to the said act; and consequently, that Mrs. *Poaug* the claimant would take nothing

in right of her deceased infant son; so that in fact, the great and leading question in this case, was, whether the act for the distribution of intestates' estates, did or did not *carry down such distributions among collaterals*, further than to *brothers and sisters*, and the *children of brothers and sisters* of the intestate.

Poaug ads. Gadsden and others.

It was admitted on both sides, that there were no lineal descendants of the intestate, and that the whole of his estate must go off to, and be divided among, collateral relations: but, how far the right of representation among these collaterals was to extend, was the question?

Mr. *Parker*, for the petitioners, contended, that by our act of distribution, passed in 1791, *John Poaug*, the grand nephew of the deceased, was totally excluded from any distributive share of his grand uncle's estate, as that act did not carry down the right of distribution among collaterals further than *brothers' and sisters' children*, and there the right terminated or ended; after which, it carried it back in the ascending line, rather than permit it to go down lower among collaterals; and that that part which would have gone to *John Poaug*, the nephew of the intestate, reverted back to, and formed a part of, the aggregate fund of the said intestate's estate, to be divided in five equal parts among the surviving brothers and sisters, and the children of his deceased brothers and sisters. That as the right to a distributive share in said estate never vested in the grand nephew, he could transmit none to his mother, the present claimant; though he admitted there were cases in the books upon the construction of wills and deeds, where grandchildren were considered as children, for the purpose of effectuating the benevolent intentions of the testator or donor.

But, he said, the act in question included no such right, as would appear by an attentive consideration of the different clauses of it.

The latter part of the fourth clause of the act under consideration, which regulates the distribution of intestates' estates among collateral relations, in cases where there are no

Poaug ads. Gadsden and others.

lineal descendants, expressly declares, " that the *children* " of the deceased *brother* or *sister* of the intestate shall take " among them respectively the shares which their *respective* " *ancestors* would have been *entitled to*, had they *survived* " *the intestate*."

The fifth clause of the act holds the same language: " That if the intestate shall have no lineal descendant, father " or mother, brother or sister of the whole blood, but shall " leave a widow, and brother and sister of the half blood, " and a *child* or *children of a brother or sister of the whole* " *blood*, the widow shall take one moiety of the estate, and " the other moiety shall be equally divided among the bro- " thers and sisters of the half blood, and the *brothers' and* " *sisters' children of the whole blood*, taking among them a " share equal to a share of the brother and sister of the half " blood. But if there be no brother or sister of the half blood, " then a moiety of the said estate shall descend to the *child* " *or children of the deceased brother or sister*."

The sixth clause declares, " that if the intestate shall leave no lineal descendant, father or mother, brother or sister of the whole blood, or *their children*, or brother or sister of the half blood, then the widow shall take one moiety, and the lineal ancestor or ancestors, if there be any, the other moiety."

The seventh clause declares, " that if the intestate shall leave no lineal descendant, father or mother, brother or sister of the whole blood, or their *children*, or brother or sister of the half blood, or lineal ancestor, then the widow shall take two-thirds of the estate, and the remainder to the next of kin."

Thus it was very evident, he said, from the whole of these clauses, taken either collectively or separately, the statute never meant or intended to carry down the distribution further than to and among *the children of brothers and sisters of the whole blood;* it excludes the children of brothers and sisters of the half blood entirely.

The fourth clause of the act, in express words, confines the distribution to the children of deceased brothers and

sisters of the whole blood. The fifth clause puts the children of the brothers and sisters of the whole blood upon the same footing with brothers and sisters of the half blood.

Posaug ads. Gadsden and others.

The proviso in the sixth clause contemplates the children of brothers and sisters of the whole blood, and brothers and sisters of the half blood, as the lowest stages of distributions, because it declares, that *in default of them*, the estate shall go back in the ascending line to ancestors; and if, in any part of the law, it had intended to carry down the right of representation any further, it would have been in this clause, where it stops in the descending line, and retrogrades back to the ascending line, so contrary to the genius and spirit of the common law.

So in like manner, he said, the proviso in the 7th clause carried over two-thirds to the widow in default of lineal descendants, lineal ancestors, and brothers and sisters *or their children*, of brothers and sisters of the half blood, to the next of kin *ad infinitum;* all which clauses make it clear beyond all controversy, that the act sooner than carry down the right of representation lower than brothers' and sisters' children, or brothers and sisters of the half blood, consigns it over to the next of kin, without limitation, or carries it back to the ancestors, contrary to the principles of the common law. He next urged, that the act of 1797, amending the act of 1791, held out the same idea, and enacts, that the *issue, if any*, of any deceased *brother or sister*, if more than one, shall take *among themselves* the *same share of the intestate's estate*, which their father or mother, if living, would have taken; and if but one such issue, then *he* or *she shall take the share* which his or her father or mother would have taken. Here it was evident, that this latter act which was explanatory of the principles of the former act, stops at the precise point where the act of 1791 stopped, to wit, at the children of deceased brothers and sisters of the intestate, and there leaves the right of representation: both acts coincide upon this point, and prove that the legislature of this country never intended to carry this right further down.

Poaug ads. Gadsden and others.

He said, he would now draw the attention of the court to the *English* statute of the 22d and 23d of *Charles* II. chap. 10. which was the model of our act of 1791, or pattern from which it was drawn.

The statute of *Charles* II. after declaring the mode and manner of distributing intestates' estates in *England*, between the widow and children of an intestate, goes on and declares, "that if there be no lineal descendants of the intestate, or their representatives, then one moiety to go to the widow, and the residue to be distributed equally to every of the next of kindred of the intestate, who are of equal degree, and those who represent them; *provided*, *that there be no representation admitted among collaterals*, *after brothers' and sisters' children:* and in case there be no wife, then all the estate be divided among the children; and in case there be no children, then to be divided among the next of kindred *in equal degree to the intestate*, and *their legal representatives as aforesaid*, and in no other manner whatsoever." The proviso in this statute, like the clauses in the act of 1791, restricts the right of representation to *children of brothers* and *sisters*, and goes no further down; and in default of them, carries over the estate to the next of kindred of equal degree to the intestate. So far, then, the *British* statute and our act of 1791 go hand in hand, with respect to the subject matter now particularly under the consideration of this court.

Upon the construction of this clause, he observed, that there had been a series of adjudged cases in the books, from the 35th year of the reign of *Charles* II. down to Lord Chancellor *Parker's* time in 1719, when the law on this point appears to have been finally settled in *England;* in all of which cases, it had been determined and adjudged, that there should be no representation among collaterals, further down than *brothers' and sisters' children.*

2 *Shew.* 286. *Holt's Rep.* 259. *Salk.* 250.

Pett's case, in 1 *P. Wms.* 25. was a leading case, and remarkably strong in point. In that case it appeared, that the intestate left a *deceased brother's child*, and two *deceased brothers' grandchildren;* and it was determined after so-

Poaug ads. Gadsden and others.

lemn argument, that the grandchildren could not be admitted to a distributive share of the intestate's estate, because, the clause in the statute was express; which says, that there shall be no representatives among collaterals beyond brothers' and sisters' children; that the words of the act were so strong, that there was no getting over them, as it was intended that none should take by representation, but the children of brothers and sisters of the intestate.

So in this case, he observed, that if *John Poaug*, the grand nephew of the intestate, and son of the claimant, took at all, he must have been entitled as *next of kin in equal* degree, or else *as representative*. As to his being next of kin in equal degree, there was no colour for it; for he was the grandchild of *Charlotte* the sister, and not the child, and was therefore one degree further off than the petitioners; and as to his being a representative he could not take inasmuch as he was not *a child of the sister* of the intestate, but a grandchild; consequently, he was excluded by that statute, which declared in negative words, that there should be no other kind of distribution whatever. The case under consideration, therefore, and *Pett's* case, he contended, were exactly similar to each other; there the grand nephew and niece were excluded from any distributive share, and here upon the same principles, the grand nephew must be excluded also.

The case of *Bowers and Littlewood*, 1 *P. Wms.* 594. he argued, was also strong in point. One died intestate leaving no wife or child, but his next of kin was an uncle by his mother's side, and a deceased aunt's child; there the Lord Chancellor decreed the whole to the uncle, to the exclusion of the aunt's son, because one degree more remote than the uncle. In this last case, the Lord Chancellor held, that the law had been settled in *Pett's* case, and he did not think proper to call that decision in question.

The *Attorney-General*, *Mr. Pringle*, on behalf of the claimant, Mrs. *Poaug*, contended, that upon the death of *John Poaug*, the nephew of the intestate, a sixth part of the

Poaug ads. Gadsden and others.

intestate's estate, vested in his grand nephew *John Poaug*, and at his death was transmissible to his mother, the present claimant. That this grand nephew was entitled to a distributive share under an equitable construction of the 4th clause of the act, which was passed in conformity to the 5th section of the 10th article of the constitution of this state, for abolishing the rights of primogeniture, and giving an equitable distribution of the *real estates* of intestates, as well as personal estates. It may be more justly remarked of this act, than of the act of the 22d and 23d *Charles* II. that it was called a statute of distributions, as intended to be diffusive in distributing the intestate's effects, to prevent any single or few hands from sweeping away the whole estate, and to dispose of it so as that all the near relations of the intestate might be provided for; by which construction the statute would do most good. It has been further remarked of the same statute, that it was remedial and intended to put an end to the controversies between the spiritual and temporal courts; to prevent the mischief before the statute, of administrators carrying away the whole of the personal estate of the intestate, and therefore the statute was made to let in the relations of the intestate in such a degree of proximity, to such a share as the statute directs, as the law or reason requires, and as one may suppose the intestate himself would have done if he had made a will. In various adjudications which the courts of common law have made upon the construction of the statute 22d and 23d *Charles* II. they have construed it in a manner most favourable to a diffusive distribution.

It has been determined, that a brother of the half blood should be admitted to an equal distribution with the brother of the whole blood, although the statute is silent as to the half blood, because in respect of the father, the half blood is as near as the whole blood; and also, because it is to be presumed, that if he had made a will, he would have given him an equal share, 2 *Mod.* 204. 2 *Vern.* 403. 437. which construction may be said to be making a will for the intestate founded on reason and good sense. So in like manner,

Poaug ads. Gadsden and others.

our statute of distributions in 1791, may be said to be making a will for every intestate who dies in this state, or in other words, it was intended to supply the omission. Suppose, then, that the intestate in this instance had made a will, is it presumable that his affection for his nephew *John Poaug*, would upon his death be extinct or buried with him in his grave, or is it not more reasonable to suppose, that it would have survived and extended to his infant son? most unquestionably it would; otherwise you must do violence to the finest feeling of the heart. It is admitted in this case, that if *John Poaug* the nephew had survived, he would have been entitled to one-sixth part of the estate. Will the court then give such a construction (unless obliged by the positive terms of the act) as will add misfortune to misfortune, in depriving the unoffending infant, of the share his father would have been entitled to? It is hoped the court will not; but be astute in giving a construction, more consistent with the dictates of justice, and the sound policy of the act. In effectuating these, surely the court will conceive itself warranted in going as far as courts have done with regard to wills, in carrying the benevolent intention of a testator into execution. In 2 *Vern.* p. 50, 51. *Crook* v. *Brookings*, money was bequeathed to the testator's daughter *Ann Crew* for life, and if she died in the life-time of her husband, then to go to the children of her sister *Leach*, in such shares as the said *Ann Crew* should advise: some of the children of *Leach died, leaving issue*, and then *Ann Crew* died in the life-time of her husband, making no appointment. It was decreed, *per curiam*, that the money should be distributed among all the children of *Leach*, and their representatives *per stirpes* and not *per capita*. It was objected by the counsel, that if *Ann Crew* had been living to have made the appointment, she must have distributed among the children of *Leach then living*, and could not have given away any part thereof to the child of any one that was dead. *Sed non allocatur per curiam.* This decree was afterwards reversed, but admitted by all the judges, that where there is no child, *grandchildren may take by a devise to children*, consistent

Poaug ads. Gadsden and others.

with the apparent intention of the testator. In various cases again it has been determined, that *grandchildren* shall take under the *description of children*, as in 4 *Vez.* jun. 437. This has also been decided in our own courts of equity; which has gone very far in admitting *grandchildren*, under the *description of children, in loco parentis*, even in cases where such construction was not supported by any very plain evidence of such intent; as in the case of *Elliott and others* v. *Executors of B. Smith;* also in the case of *Sealey* v. *Laurens, Executor of Ball;* and the case of *Drayton* v. *Executors of J. Drayton;* all determined after solemn argument in the court of equity.

It is not denied but that our act of 1791 is a remedial statute, made in order to supply the defect or omission of intestates who neglect to make wills. In fact, it may be considered as making a will for every intestate. If then that is a fact, which will not be denied, then surely it ought to have the same liberal construction which is given to last wills and testaments. Admitting this to be the case, it follows, that all the principles of the foregoing cases apply most pointedly to the present case, and prove that *John Poaug* the grand nephew ought to take, *in loco parentis*, the share that his father was entitled to. But it is alleged, that the same latitude of construction is not allowable in construing statutes, as are exercised by our courts in construing wills, &c. this position, however, he thought not tenable, because he conceived the same rules would apply.

It is laid down by *Plowd.* 36. 109. 467. and also by Lord *Coke*, in his rules for construing statutes; that in order to form a right judgment, whether a case be within the equity of a statute, or not, it is an excellent rule to suppose the law maker present, and that you have asked him this question. Did you intend to comprehend this case within the intent and meaning of the statute, or not? and then you must give yourself such an answer, as you imagine he, being an upright and reasonable man, would have given to the question; if this be, that he did mean and intend it to be within the intent and meaning of the statute, then you may

Poaug ads. Gadsden and others.

safely conclude, that such was truly the intent of the law-maker; for while you do no more than he would have done, you do not act contrary to the statute but in conformity thereto: certainly, then, according to this rule of construction, if the same question was asked here, the answer would be, that the legislature in this 4th clause of the act, "that children of a deceased brother and sister" should not be confined to the immediate descendants, but to comprehend *grandchildren*, and be equivalent to the word *issue*; which may be legally presumed or evinced by collating or comparing this 4th clause with the act passed 16th of *December*, 1797, explanatory of the act of 1791; and here he said it was an established rule of law, that all acts *in pari materia*, are to be taken together, as if they were one law, as laid down by Lord *Mansfield* in *Doug.* 30: also, *Bac. Abr.* new edit. vol. 6. p. 382. This amending act in 1797, declares, that in all cases where any person shall die intestate, leaving neither wife nor child, nor lineal descendant, but having a father or mother, brothers and sisters, one or more, that the estate real and personal of the intestate shall be *equally* divided amongst the father, or if he be dead the mother and such brothers and sisters, so that such father or mother, as the case may be, and each brother and sister living shall take an equal share, provided always, that the *issue*, if any, of any deceased brother or sister, if more than one, shall take among themselves the same share which the father or mother would have taken if living. Here it is evident, that the legislature have made use of the word issue as synonymous, or of the same import with the word *child*, or *children*, or *grandchildren*, and so the 4th clause of the act in 1791, being *in pari materia*, relating to the same subject, should have the same construction as meaning *children or grandchildren*; this would render them consistent with each other, otherwise the two acts having different meanings would render them discordant parts of the same system, and would be making the legislature speak a different language in the two acts, without a difference of reason or cause, contrary to the maxim *ubi eadem ratio, idem jus.*

Poaug ads. Gadsden and others.

If then it is to be legally presumed, that it was the intent of the legislature, that the term children in the above 4th clause, should be of equal import with the term issue, there will be an end of the question or controversy in this case; for issue will in its technical and appropriate signification, comprehend grandchildren.

The term issue is *nomen collectivum*, comprehending all descendants, unless there be something express to confine it. 10 *Mod.* 376. Grandchildren are entitled and take under a bequest to issue. *Freeman* v. *Parsley*, 3 *Vez.* jun. 421. 1 *Vez.* jun. 196.

So under a bequest to the issue of *A.* all the descendants are entitled, and take *per capita*, 3 *Vez.* 257. 383.

He next contended, that the legislature has not in the 4th clause of the act of 1791, made use of any *negative words*, *to exclude grandchildren or grand nephews* from coming *in loco parentis*, or from representing their parents; and no purpose of inconvenience, object of policy, or rule of construction can be answered by such exclusion.

In answer to *Pett's* case, quoted from *P. Wms.* 25. and the other cases referred to by the gentleman in his argument in favour of the petitioners, they all turned upon *negative words* in the statute of 22 and 23 of *Charles* II. which *excluded the courts* from any other construction, though strongly inclined to do so, if they had not been restricted by the prohibitory words of that statute; whereas, he said, there were no such negative or restrictive words in the act of 1791; it is silent on this head, and leaves the word *children* open to judicial construction, which is fully explained by the words in the act of 1797. The *Attorney-General* concluded by saying, that he presumed the court upon the present occasion was at perfect liberty to give the most liberal construction to an act of distribution, this being one of the first cases upon the subject which had come fully before them. That the court of equity had been very liberal in their constructions upon wills and settlements in favour of grandchildren, so he hoped the common law judges would find themselves at perfect liberty to be equally so in their con-

struction of the act in favour of the grand nephew of the intestate, and through him to the present claimant Mrs. *Poaug*.

Poaug ads. Gadsden and others.

The judges took time to consider this case, and afterwards the opinion of the court was delivered by Mr. Justice WATIES, as follows:

The question in this case, he said, was, whether the grandchild of a deceased brother or sister of the intestate was entitled to a distributive share of his estate in right of representation? Such a right was claimed under the following words; "the children of a deceased brother or sister, "(where there are no lineal descendants) shall take among "them respectively, the share which their respective an- "cestors would have been entitled to, had they survived the "intestate." It is contended, for the claimant, that the word children *included grandchildren*, and a great number of cases were cited of wills and deeds in which this word had been so construed, but he could see nothing in those cases which ought to govern the present case; in all of them, the word children was construed to mean "*grand-* "children," in order to effectuate the intentions of the donors; but they all shew, that this was a strained construction, and contrary to the proper import of the word. It is true, that the intention of a law, like that of a private deed of an individual is to govern it; but there is a wide difference between them; a law is to be construed according to a *general intent*, and not a particular one; in a deed or will the object is special, and the court may therefore control or even change the proper meaning of words. But a law contemplates no single case, its object is general, its construction therefore must also be general, and not made to *suit particular cases*.

What, then, is the meaning, or general import of the word children? Why certainly the first descendants. This construction has been given to the same word in the *British* statute of distributions; and the only difference be-

4 *Burn. Eccl. Law*, 358. 1 *P. Wms.* 28.

Poaug ads. Gadsden and others.

tween that act and ours, is, that the first defines negatively the right of representation in collaterals, and the last defines this right by affirmative words. The reason of the proviso in the former, is, that the preceding clause gave this right without any restriction, and it was necessary by a proviso to limit the extent of it; but in our act, the extent of the act is declared at once, and a proviso was unnecessary. By this, the representation of a collateral is expressly confined to the children of brothers and sisters, and there are no other words in the act, which shew an intention in the legislature to extend it further; the contrary may be very fairly inferred. In making a will for persons who should die intestate, the legislature no doubt intended to make such a distribution, as it presumed, would be agreeable to the general wishes and sentiments of intestates. He said, he believed that generally, persons, circumstanced as the intestate in the present case was, would not carry their views of distributions beyond surviving brothers and sisters, or the first descendants of those who were deceased. The attachments of blood was much diminished to collaterals after the first degree; a man may indeed be willing to put the first descendants on the same footing as their parents, but a grand nephew or a grand niece is not usually regarded by him as objects of equal concern, and without some particular cause for partiality towards them he will not be disposed to let them share equally in the division of his estate. It is unnecessary, however, to inquire into the reasons of the legislature for limiting the distribution in this way; the words of the act require this construction, and we have no right to look any further. The right of property by descent is not a natural one; it is conferred by society, or depends upon the regulation of law; and we are bound to give effect to the will of the legislature, without admitting any speculations to the contrary.

It was therefore ordered, that the writ of partition should issue, to divide the intestate's estate into five

equal parts among the petitioners, agreeably to the prayer of the petition, and that the claim of Mrs. *Poaug* be rejected.

Poaug ads. Gadsden and others.

Present, GRIMKE, WATIES, JOHNSON and TREZEVANT.

CHARLES FLORIAN MEY *against* TUNNO and COX.

Charleston District, 1801.

CASE on a policy of insurance. Verdict for plaintiff. Motion for a new trial.

This action was brought on a policy of insurance on the brig *Harriet and Ann*, bound to ——. On her voyage outward she was captured and taken into *Jamaica*, where she was libelled and acquitted; but an appeal was made by the captors from the sentence of the vice-admiralty court in *Jamaica*; in consequence of which, the supercargo, on board the vessel as agent for the concerned, was compelled to give security for the production of the vessel and cargo, or payment of the appraised value thereof to the captors, in case the suit should be determined in favour of the appellants before she was finally delivered over to him. The supercargo, however, being a stranger in *Kingston*, and the plaintiff having no correspondent to value himself on, he was obliged to sell both vessel and cargo, and deposit the proceeds in the hands of the securities in order to indemnify them, in case the determination should be pronounced in favour of the captors. This was therefore a suit against the underwriters, as for a total loss of vessel and cargo, on a valued policy for 6,756 dollars, in which the jury gave a verdict for the whole amount. The pre-

The insured have a *right* to abandon ship and cargo upon capture, though *not obliged to do so* immediately after, if there is any probability of recovering the property afterwards; therefore, it is not too late for the owners to make their election to abandon finally after a decision in a court of admiralty, on the subject of prize or no prize.

Where an appeal is made by the captors, and security is ordered to be given for the forthcoming of vessel and cargo, or the appraised value thereof, by the claimants on getting possession of them, this is not to be considered as a restitution, only an interlocutory decree which may be compared to property seized for rent at common law and replevied. It is not conclusive or definitive on the parties; the delay and uncertainty of decision are risks within the policy.

Mey v. Tunno and Cox.

sent was therefore a motion for a new trial on the following grounds, viz:

1st. Because there was no formal abandonment.

2d. Because the insured ought to have made their election within a reasonable time after the capture, in order to have given the insurers an opportunity of making the most of the brig and cargo, and of sending on letters of credit, &c. to prevent the sacrifice of the property, for one-half, or one-third of its real value, as is usual in all such cases.

3d. Because this ought to be considered as a partial and not a total loss; as the vessel and cargo sold for 4,618 dollars, as per account rendered by the supercargo.

To this it was replied, on the part of the insured, in the first place, that the right to abandon in all cases accrued on the capture of the vessel, because then it is, that the object of the voyage is defeated; and of this, the underwriters had due notice by the first opportunity after the vessel was carried into *Jamaica*. That the marine law has prescribed no precise form or mode of abandonment, as that must always depend upon circumstances which no man can foresee or guard against; but in the course of trade, letters of advice were considered as sufficient notice, and of this fact the underwriters had due notice by letters as soon as it was practicable; and from that moment it was incumbent on the underwriters to have taken all legal and necessary steps to obtain the discharge of the vessel and cargo, but if they thought proper to rely on the exertions of the supercargo; he from that time became their agent, and not the agent of the owners or shippers.

Secondly, that it was not usual or customary for the insured in foreign ports or places where the underwriters have no agents, finally to abandon the property on capture, and let it go totally to destruction, but to use all reasonable diligence to obtain restitution of vessel and cargo, or as much of it as was possible; and that when the result was known it was time enough to make this election, because it

was at that period that the real loss was finally ascertained; for instance, in the present case if the court of admiralty had decreed the vessel and cargo to have been given up without costs, and there had been no appeal, there would only have been a partial average loss, in which case the plaintiff could not have abandoned after the event was known; this, therefore, shews the propriety of not determining finally to abandon till the result was known. And what was the result in the present case? Why, the court of admiralty in *Jamaica* had decreed, that this vessel and cargo should be delivered up to the claimants upon payment of costs, from which decision there was an appeal by the captors; whereupon, and before the vessel and cargo were delivered over to the supercargo, conditions were imposed upon him, with which it was impossible for him to comply. He was ordered and directed to give security for the forthcoming of the vessel and cargo, or to pay the appraised value thereof in case this appeal should be determined in favour of the captors. What was to be done under these circumstances? Why, either to sell the whole for the most that could be got for them, or allow them to remain, or probably to perish, in the hands of the marshal of the admiralty. He preferred the former as the wisest and best course for the benefit of all concerned, and deposited the proceeds in the hands of the securities for their indemnity, where it will remain to abide the determination of the appeal, and if it should go in favour of the claimants, the money will then be at the disposal of the underwriters. Then it was that the insured were enabled to judge of the whole of the circumstances of this case, and finally to make their election; and they did so; and accordingly have gone over against the insurers as for a total loss, because it was, and is still, uncertain, whether the appeal will be determined in favour of the captors or the claimants; and the proceeds are dependant on that event; which event is within the meaning of the policy, and was one of the principal risks the insurers undertook to warrant against when they underwrote on this policy; and surely in the whole of this business, there has been no unreasonable delay or improper con-

Mey v. Tunno and Cox.

duct on the part of the agent or supercargo; and this appeared so evidently to the jury, that they gave a verdict for the plaintiff without the least hesitation.

Thirdly and lastly, it was contended, that the insured had an undoubted right to abandon in all cases, whenever the loss amounts to a moiety of the sum inserted in the body of the policy, which is the amount covered by the insurance. The sum in this case, mentioned in the policy, was 6,756 dollars; the gross amount of sales of vessel and cargo at *Jamaica* was 4,618 dollars; from which deduct the costs of the admiralty suit, disbursements and other incidental charges at *Jamaica*, as per account rendered 2,219 dollars, and there would only remain 2,389 dollars, even if the appeal should be dismissed; leaving a clear loss of 4,367 dollars, considerably more than the moiety of the sum mentioned in the policy. It was therefore urged, that the defendants were not entitled to a new trial on this grounds.

The Judges were unanimously of opinion, that the plaintiff had a right to abandon on the original capture; and that this had been determined over and over again in our courts, but it did not follow that because this was a right which the insured might exercise, that they were bound in all cases to do it immediately after the capture; for it was very much for the advantage of trade, and indeed for commerce in general, that this right should remain and continue until all prospects of regaining or getting back the property were at an end: otherwise, it would check and put a stop to all those laudable endeavours, which honest and faithful men have been in the constant exercise of in all parts of the world where captures are made, in order to reclaim and obtain a restitution of ships and cargoes; and if the pursuit of those endeavours were to be the means of debarring men of their right of eventually abandoning the property to the insurers, very few if any would give themselves any trouble about it afterwards.

That in the present case, it appeared to them that the right to abandon continued in the insured until the sentence

or decree of the court of vice-admiralty in *Jamaica*, and that it was by no means too late to make their election to abandon as soon as that event was known. But in the present case, they could not by any means consider the vessel and cargo as restored to the claimants; for upon the appeal being made, she was still subject to the right of the captors, and it was possible it might finally be given in their favour; and this was still a risk the underwriters were liable to, supposing them only liable to an average loss, although from the accounts produced, the loss exceeded the one moiety of the sum covered in the body of the policy of insurance.

That this order of restitution, however, by the vice-admiralty court at *Jamaica*, could be considered in no other light than as an interlocutory order; and the vessel and cargo, and the proceeds thereof, may well be compared to property seized at common law for rent and replevied, which was still liable to the landlord's demand; although the defendant had got back the possession of it till the right was finally determined, upon his giving security to return the property seized, or have it forthcoming to answer the demand in case the suit should go against him.

The Judges were therefore all of opinion, that the underwriters were liable, and that the rule for a new trial should be discharged.

Present, GRIMKE, WATIES, BAY, JOHNSON and TREZEVANT.

Columbia District, 1801.

NEWELL WATON *against* TOLEVER BOSTWICK.

Commissions for the examination of witnesses abroad transmitted thro' the channels of the post-offices, without any suspicions of unfairness about them, ought to be opened and the depositions read in evidence, although there be no endorsement of the delivery into the post-office by a commissioner, on the back of the commission; on the ground, that where there is no fraud alleged, it shall not be presumed; and that it is fair to presume, that all was done which ought to have been done by the commissioners in the execution of their trust in another state.

MOTION for a new trial.

The ground upon which this motion was made, was, that certain commissions which had been issued in this case, in order to examine witnesses in *Virginia*, and also in *Georgia*, had not been permitted to be opened, and the depositions read on the trial by the presiding judge; because, it did not appear that the commissioners named in said commissions, or one of them, had deposited the said commissions and depositions after the examination of the witnesses in the post-offices in those states to be forwarded on to *Carolina*; by which means the defendant was deprived of the benefit of the testimony of the witnesses so examined, and had a verdict against him.

In support of the present motion, it was urged, that the commissions themselves had all imaginable fairness about them; they had been taken out of the post-office at *Edgefield* by the clerk of the court, who paid the postage for them; and they had each the name and seal of the commissioners on the package, enclosing the commissions with the interrogatories and answers, &c. and no allegation of fraud or foul play had ever been suggested. The reason why an affidavit had been formerly required by a person who received the commission, was, because they were generally entrusted to the care of private persons, and often to the parties themselves or their agents; and therefore, to guard against frauds and fraudulent practices, the oath of some credible witness was required, that the commission had been received from the commissioners, and had remained unopened with such witness until delivered to the clerk of the court. By the rule, and present practice of our courts, these commissions for the purposes of despatch, and to avoid expense, have been ordered to be transmitted through the channel of the post-offices throughout the union; as the post-masters are all sworn officers of

the government, who can have no interest in the matter in dispute one way or the other: which mode of conveyance has been thought to be as safe, if not safer, than the old mode of forwarding them by a private hand; and although the rule of the court does require, that a certificate shall be endorsed on the back of the commission, that it was lodged in one of the post-offices by one of the commissioners, yet the name endorsed blank on the commission is tantamount to such certificate, for it may be filled up, or the certificate wrote over the name or names of the commissioner or commissioners; but supposing the name of the commissioner endorsed blank on the back of the commission will not bear this construction, no rule of court here will be binding on a person in another country; and it may be imposing a trouble on a man, which he may not be disposed to submit to; at all events, it is a much safer mode of conveyance than the old one, and a better security against frauds. The commissioners are men in whom the parties on both sides are supposed to place confidence and trust; it is therefore fair to presume, that every thing has been done by them which ought to have been done. Fraud or improper conduct is not to be presumed.

In reply, it was said, the rule of court on the subject, required such a certificate, that the commissioners, or one of them, had deposited the commission in the post-office abroad; that this was done to guard against fraud or improper conduct, and that a deviation from it might be dangerous to suitors, as it would be opening a door for the admission of impositions, and practices inconsistent with justice.

A majority of the Judges present were of opinion, that there should be a new trial in this case; and the more especially, as no fraud or improper conduct has been alleged, which ought not to be presumed. With respect to the rule of court, it was certainly intended to prevent frauds and

Waton v. Bostwick.

impositions in procuring the testimony of witnesses abroad; but in cases where no such fraud is alleged, or even suggested, it would be instrumental in working a material injury to the party to give it a rigid construction.

It has been wisely said, that rules of practice are made for the advancement of justice; but in cases where a rigid adherence to them would produce manifest injustice, they may be relaxed for obtaining the ends of justice. For aught that appears in the present case, the commissions in question may have been deposited in the post-offices in *Alexandria*, and also in *Georgia*, by one of the commissioners, although there be no certificate of it endorsed on the commissions; and in the execution of a trust it is fair to presume, that every thing which ought to have been done by the commissioners has been done by them.

For these reasons, a majority of the judges were of opinion, that the commissions should have been opened, and depositions read on the trial.

Rule for a new trial made absolute.*

WATIES, BAY and JOHNSON, for the new trial. TREZEVANT, contra.

* *Kitchens* v. *Pettypare*, a case from *Camden*. A new trial was ordered on the same grounds.

WILLIAM KEY *against* EDMUND HOLEMAN. *Columbia*, 1801.

ASSAULT and battery. Verdict for the plaintiff. Motion for a new trial on the ground of misconduct in the jury.

This was a case tried in *Edgefield* district, in which the jury gave a verdict for 1,000 dollars, for a most violent and atrocious assault.

This was therefore a motion for a new trial on sundry affidavits charging the jury who tried the cause with misconduct. But resolved, by all the Judges unanimously, that this court will not receive or hear such affidavits read against jurors, unless the affidavits or copies of them had been served upon the jurors before the rising of the court, in order that they might have an opportunity of exculpating themselves on oath, which has been determined in this court in a variety of cases; and that this rule was the same in civil cases as in criminal ones; otherwise, no verdict would be secure from subsequent attacks; besides, it would be opening such a door for perjury, which could not be closed, by all the caution and circumspection of our courts of justice.

No affidavits will be received by the court, or permitted to be read, charging jurors with misconduct, unless they are served on such juryman (or copies of them) before the rising of the court, in order that they may have an opportunity of exculpating themselves on oath.

Rule for new trial discharged.

All the Judges present.

Charleston District, 1801.

MATHEW O'DRISCOLL *against* MAURICE VIARD.

Tavern licenses, and licenses for billiard tables, &c. and to made and issued out by the clerk's of the courts of sessions in the different districts in the state, upon the recommendation of the commissioners of roads and highways, and not by the commissioners themselves, or other person acting under their authority.

THIS was a *qui tam* action, which was submitted to the court on a special verdict.

The verdict found substantially, that the defendant kept a tavern near a place called the *Cypress*, on the *Orangeburgh* road, in *St. George's Parish*, *Colleton* district, under a license granted by the *commissioners of the highways of the said parish*, and not under the hand and seal of the *clerk of the said district*, in which the defendant resides; and therefore submitted the point to the court, whether the license was legal or not; and then concluded in the usual manner, &c.

Mr. *Cheves*, for the plaintiff, argued, that the tavern license in question was not agreeable to the general law upon that subject. That the second clause of the act of 1784, enacts, that two or more of the magistrates for the respective districts of the state, are authorized and required on every *Easter Monday*, and on the first *Monday* in *August* in every year, to grant certificates and recommendations to any persons in their respective districts, fit and qualified to keep a tavern, inn, ordinary, punch or alehouse, or billiard-table, or to retail strong liquors; and the persons to whom such certificates and recommendations are so given, are required to produce the same to the clerk of the court of sessions of the district in which they reside, who is authorized and required to make out a license under his hand and seal for that purpose. And any person keeping such tavern, or inn, without such licence, shall pay and forfeit the sum of 50*l.* sterling, one-half to any person who should inform and sue for the same, and the other half to the state.

Public Laws, 240.

That although several acts of assembly were passed afterwards, regulating tavern licenses, yet the act of 1784 regulated this point till the year 1789.

The 53d clause of the county court act in 1785, gave the power of granting tavern licenses, &c. to the judges of the county courts, who were also authorized to take bonds for the good behaviour of tavern-keepers, and generally to do all other matters incident to the said business. But this clause in the act of 1785, made no alteration in the districts where county courts had never been established. An act passed, in 1789, imposing a tax on tavern-keepers for the use of the counties where county courts were established; and in the same year, another act passed, giving the power of granting tavern licenses, &c. to the commissioners of the roads and bridges, in the parishes and districts where no county courts were established, and the moneys arising therefrom was given for the repairs of roads and bridges within the same.

Public Laws, 344.

That the act of 1799, after abolishing the county courts, declares, that the commissioners of the roads throughout the state, or a majority of them in their respective districts, should thereafter have full power and authority *to order licenses* to be granted to proper persons to keep taverns, &c. and to retail spirituous liquors, and also to keep billiard-tables; which licenses, *when ordered*, should be granted and delivered out *agreeably to law*. He then contended, that although the act of 1789, took away the power from the magistrates of the districts, to recommend fit and proper persons to keep taverns, &c. and gave it to the commissioners of the roads, who were authorized by the latter act to grant them; yet, the act of 1799 restored the former method of granting them by the clerks' of courts of sessions, in the different districts, and only authorized the commissioners of the roads to recommend, or to make an order that the licenses should be made out to fit and proper persons, which was only giving them the same powers which the magistrates had by the act of 1784; for the words, *to order licenses to be granted*, cannot be construed to mean more than to recommend, or direct them to be granted, to fit and proper persons *agreeably to law*, upon the production of such recommendation. What law? It cannot surely mean

See page 54 of the act of *December*, 1799.

O'Driscoll. v. Viard.

the law of 1789, because that act gave the commissioners the power of granting these licenses themselves, and therefore it was a needless and unnecessary act, to recommend persons to themselves, and of whose fitness they were themselves to judge and ultimately to determine. If it does not refer to that law, it must then mean some other law or act, and there is no other law upon the subject but the law of 1784, which prescribes the mode of granting tavern licenses by the clerks of the district courts; to that act, then, the law of 1799 must refer, as the rule to be resorted to in granting these licenses; and the reason of the thing speaks strongly in favour of such a construction, first, because the commissioners of the high roads have the most general and extensive acquaintance with persons living on the high roads, and are the best judges of proper stages on such roads, and where public houses are or ought to be kept; so far then in favour of their giving the necessary recommendations; and, secondly, because the clerks' offices in the different districts being public offices, and fixed and stationary, they are the fittest places for depositing the bonds and securities for the good behaviour of tavern-keepers, &c. and the clerks being men in the regular habits of business, they are the fittest persons to take and record all bonds and licenses; and, lastly, being in the centre of each district, they are most convenient for all persons to resort to in order to carry on prosecutions for neglects or misbehaviours; and the originals are always conveniently at hand within reach of the courts of justice, to support and maintain such prosecutions when necessary.

Mr. *Ward*, for defendant, contended, that the act of 1789 virtually repealed the act of 1784, and transferred the right of recommending fit and proper persons for keeping taverns, &c. from the magistrates to the commissioners of the highways; and in like manner, the power of granting licenses from the clerks of the courts of sessions, and united the whole power of judging of the characters of the persons who were to be licensed, and of granting the licenses; and

these powers were accordingly exercised by them for the space of ten years, when the act of 1799 passed. In this latter act, the power of nomination and recommendation is still retained to the commissioners of the roads, but the power of making the licenses is still to be under their control, and subject to their orders and directions, and may well be construed to mean the clerk of their board, so as to give them the whole and sole direction and management of taverns and billiard-tables, &c. &c.

The Judges expressed their concern, that the clause in the act of 1799 was so obscurely penned, that it was really difficult to tell what the true intent and meaning of the legislature was; whether it was to restore the old method of granting tavern licenses by the clerks of the courts of sessions in the districts, as established by the act of 1784, or to retain it under the sole authority of the commissioners of the highways, as directed by the act of 1789; one thing, however, is certain, that their intention was to retain the power of nominating and recommending fit and proper persons for keeping public houses in the hands of the commissioner of the roads, instead of restoring it to the magistrates who formerly possessed it; but the difficulty was, in determining who were the persons to make out and issue these licenses to publicans of every description. It is to be observed, that the act of 1784 is a public law in aid of the revenue of the state; it fixes the mode and manner of making out these licenses, and designates the clerks of the courts of general sessions of the peace, as the proper persons for that purpose. It also fixes and ascertains the fees to be paid upon every license, and likewise imposes a penalty for breach of the law; both the acts of 1789 and 1799 are silent on all those points. The judges, therefore, were of opinion, that it was best to make some fixed and certain law upon the subject the rule of their decision, rather than to speculate upon new principles, which were in their nature hypothetical; as that the clerk of the board of commissioners of highways was meant and intended as the proper per-

O'Driscoll v. Viard.

sons, to make out tavern licenses, &c. who were persons unknown in law, and altogether dependant on the will of the commisioners of highways for their appointment and continuance in office, and who were removable at their pleasure; they therefore thought it the safest, and best way, to make the law of 1784 the rule of their decision, which was the only general law in force which fully embraced this subject. They were, therefore, unanimously of opinion, that the clerks of the general sessions of the peace, in the different districts through the state, (in pursuance of the orders and recommendations of the commissioners of the high roads in each district,) were the proper persons to make out and issue all those licenses, and to receive and account for the fees, &c. The clerks' offices were public ones, where all the recommendations are to be filed, and all recognisances and securities for good behaviour are to be taken and deposited, and all other documents are preserved, which go to the maintenance of peace and good order in the community, and where all prosecutions are carried on, and penalties received for breaches of the law.

The *postea* was therefore ordered to be delivered to the plaintiff, that judgment might be entered up in his favour.

Present, GRIMKE, WATIES, BAY, JOHNSON, RAMSAY and TREZEVANT.

Executor and Executrix of SARAH HARTH, deceased, *against* WILLIAM HEDDLESTONE. *Charleston District*, 1801.

TROVER for sundry negroes, tried at *Georgetown*, before TREZEVANT, J. Verdict for defendant. Motion for new trial.

The sale by an administrator of any part of the intestate's goods and chattels for payment of debts, &c. is good and valid, although such administrator may have had no order from the ordinary to make such sales.

Defendant claimed under a bill of sale from an administrator of an estate, who had sold the negroes in dispute without permission from the ordinary, or, in other words, had not conformed to his directions; and the question was, whether a sale by an administrator without the permission of the ordinary, was good or not? Upon the trial it was urged, that the 19th clause of the executors' law of 1789 required, "that when it should be requisite to make sale of "the intestate's personal estate, for payment of debts, for a "division, or to prevent the loss of perishable articles, "application should be made to the court of the county, or "ordinary, *for an order* for sale; whereupon, the court "or ordinary, might grant or refuse such order, regulating "the time, place, and credit to be given, in such manner as "to do justice to all persons concerned therein." And this, it was contended, made it necessary to obtain such order before any administrator could make sale of any part of an intestate's estate.

To this it was argued, that this was a regulation which did not alter the law at all upon the subject, but was a proceeding merely in favour of an administrator, and to lessen or divide his responsibility with the ordinary, in case fault should be found with his conduct at any future day, by any person interested in a distributive share of said estate; or at all events, to shew that he meant and intended to make the most of the estate for those interested, in case he should ever afterwards be called to account for it. But that it did not in any degree affect the right at any sale, of any *bona fide* purchaser, where no such order had been obtained.

Executor, &c. of Harth v. Heddlestone.

The presiding Judge, in charging the jury, told them, that an administrator might take upon him to sell the personal estate of the intestate if he thought proper, without permission from the ordinary; and that his bill of sale was valid to the purchaser, who would be protected in the purchase. That there was nothing in the executors' law (clause 19th) which took away the powers given by law to administrators on this head, to dispose of the goods and chattels of the intestate. That an administrator was chargeable with a deceased man's estate, the moment he qualified and took upon him the burthen of the administration, and an action would lie against him in the same manner as against an executor; and he is bound to pay off the debts of the deceased in the same manner, as far as the effects of the intestate will extend. That the administrator has a special property in the goods of the intestate, and he may do all acts which are incumbent on an executor to perform; he may sell all kinds of goods which are in their *nature perishable*, or which might be *worse for keeping*, or for payment of debts; there was nothing in this act which took away any of the powers vested in an administrator by law, and it would be a most dangerous thing to take them away by construction or implication; it would be against every principle of the common law. The law, he observed, was very favourable to sales made to fair and *bona fide* purchasers of property, at those kinds of sales made for the benefit of deceased men's estates by administrators, and therefore it is laid down, that if the ordinary grants administration to a stranger, and the next of kin sues out a citation from the spiritual court to have the administration revoked, and pending the suit the administrator sells goods to defeat the next of kin, and then letters of administration to the stranger are revoked and made null by sentence; yet, in this case, the sale made by the administrator is good and valid in law.

Office of Executors, 366.

2 *Bac. Abr.* 381.
1 *Roll.* 910.

Went. Office of Executors, 374.

* The jury in conformity to the judge's charge, found a verdict for the defendant in favour of the sale. This,

therefore, was a motion for a new trial on the ground of misdirection, and as a verdict against law.

Executor, &c. of Harth v. Heddlestone.

The Judges after hearing arguments in favour of the motion, thought it unnecessary to hear arguments against it, as they were unanimously of opinion, that the legal principles laid down by the presiding judge to the jury were perfectly correct, and therefore refused the new trial.

Rule discharged.

All the Judges present.

MATHEW O'DRISCOLL *against* WILLIAM M'CANTS.

Charleston District, 1801.

No costs allowed against a prosecutor in a *qui tam* action, for the benefit of the public.

THIS was an action to recover the penalty under the act of assembly, for cutting a rice dam contrary to law. Penalty 100*l.* Verdict for defendant.

This suit was commenced under the act of assembly against cutting rice dams, except under certain regulations mentioned in the act, under the penalty of 100*l.* one-half to the informer, the other half to the state; in which the jury gave a verdict for defendant. On signing this judgment, it was moved to tax the costs against the prosecutor, for vexing the defendant without lawful cause of action, which was refused, and the cause came before the court by way of appeal from the prothonotary of *Charleston* district.

After hearing arguments, the court refused to allow the costs in a *qui tam* action for the benefit of the public, observing, that no man would bring actions or prosecutions for the public good, if he was liable to be mulcted in costs in case of failure, unless it was a most wanton abuse of

O'Driscoll v. M'Cants.

such an action, or where there were no grounds or probable cause.

Rule for taxing costs dismissed.

Present, GRIMKE, WATIES, BAY and JOHNSON.

Charleston District, 1801.

HUDSON HUGHES *against* BENJAMIN KIDDELL.

Endorsement of a note in part, and afterwards the residue, not good so as to charge an endorsor.

MOTION for a new trial.

This was an action against defendant as endorsor on a note of hand, in which there was a verdict for defendant. The note of hand in question was given by *David Bush*, of *Camden*, to the defendant *Kiddell*, for 473*l.* sterling. *Kiddell* afterwards made the following endorsement, viz: "*I assign* "*over to Hudson Hughes, the sum of* 1,930 *dollars and* 50 "*cents, as part of this note of hand.*

"*Signed*, "BENJAMIN KIDDELL."

Afterwards he made another endorsement, and assigned over the residue of said note. (Signed, *Benjamin Kiddell.*)

Mr. *Ford*, for the motion, contended, that both these endorsements ought to be taken together, and considered as one endorsement, as it appeared to be one transaction, done at the same time, on the same day, and made to the same person. He admitted, that an endorsement of part was not good, but that the two parts in this case, to the same person, made the whole good; and as such, the court was bound to give it a reasonable and liberal construction, as it would not subject the party to different actions; which was the reason, why the law of merchants would not admit of the splitting up contracts, and allow of different endorsements on bills and notes.

Mr. *Pringle*, in reply, contended, that from the very nature of the transaction, it must have been the intention of the defendant to restrain the negotiability of this note, as well as to exempt himself from responsibility; taking these endorsements either severally or jointly, they amount to no more than a bare authority to receive the money, or a relinquishment of the defendant's right to the note. It is not expressed for value received, so as to raise an implied assumption at law; but the law is clear that an endorsement for part is bad. *Bailey on Bills*, 34.

For if it were allowable for a man to endorse for part, he might endorse 100 dollars to *A.* another 100 to *B.* and so on; and by that means, defendant might become liable to twenty different actions on the same bill. For these reasons, and to guard against this monstrous inconvenience, the law of merchants has established it as a rule, that a bill cannot be endorsed for part. *Cunn. on Bills*, 57.

Now it is clear, from the gentleman's own acknowledgment, that the first endorsement for 1,930 dollars and 50 cents in part, is bad *ab initio;* and if so, then the subsequent endorsement for the residue never can give the first, legal validity; as it is most evident to reason and common sense, that two vitious or bad endorsements can never constitute a good whole endorsement.

The Court, after hearing the arguments, refused to grant a new trial, on the ground that an endorsement for part of a note or bill is bad. *Lex Mercatoria*, 445. *Carth.* 466. And if so, then two vitious endorsements can never constitute a good one.

Rule discharged.

Present, GRIMKE, WATIES, BAY and JOHNSON.

Columbia District, 1801.

STEPHEN BROWN *against* LEWIS COLLINS.

A defendant is never to be called upon to admit or deny a debt on oath upon a summary process, nor has the plaintiff a right to resort to equitable principles, where he has a plain remedy at common law.

MOTION to set aside a nonsuit.

This was a case from *Camden*, on a summary process, in which the defendant had been called upon by Mr. *Mathis*, the plaintiff's attorney, to declare on oath, whether he owed the debt in question, or not. And resting on what he supposed to be the rule under the authority of *Dillon and M'Cue's* case, (*ante*, p. 280.) was not prepared with any other kind of evidence to support his demand. Upon which, the presiding Judge (JOHNSON) ordered the plaintiff to be nonsuited. This was therefore a motion to set aside this nonsuit.

Sed per Curiam, unanimously, the plaintiff's attorney has mistaken the authority of the case of *Dillon and M'Cue* entirely. In that case it was determined, that if the defendant wanted the benefit of the plaintiff's oath, (if he had no other testimony to support his defence,) he might call upon the plaintiff to answer on oath, in nature of a cross-bill in equity, to any necessary point, upon a regular notice in writing for that purpose, and stating the points he meant to examine him upon; but it was never contemplated by that decision, that a plaintiff had a right to call upon a defendant in the first instance, to acknowledge or deny a debt or demand against him; it would be contrary to every rule of the common law; and it is a well known maxim, that equitable principles are not to be resorted to, where a party has his plain remedy at common law.

Let the rule for setting aside the nonsuit be discharged, and the decision of the presiding judge stand confirmed.

All the Judges present.

SETH STRANGE *against* WILLIAM EVANS.

Columbia, 1801.

CASE from *Union* district.

Motion to reverse the decision of the circuit court.

This was a case upon a summary process, in which defendant had regularly entered an appearance, and claimed an imparlance to the second court, but the presiding judge (GRIMKE) refused to allow it. Plaintiff then went on, proved his case, and got judgment; and this was a motion to reverse the decision of the circuit court at *Union* district.

An imparlance, or leave to plead at a second court, is not to be allowed in a case on a summary process, as a matter of course, upon an appearance entered, tho' upon reasonable grounds either party may have leave to postpone a cause.

In support of the motion, it was urged, that under the fourth clause of the circuit court act of 1789, the plaintiff was entitled to it *as a matter of right*. This clause declares, "that all process issuing from said circuit courts shall be "returnable to the next court, and that all proceedings should "be made up thereon and ready for trial at the next court "after;" and that it had been the practice of the circuit courts to allow imparlances in all cases where appearances had been regularly entered, under the authority of the above clause, which is general in its nature, and not confined to any particular class of proceedings in our courts of judicature, and extended to cases on summary process, as well as to cases on mesne process.

To this it was replied, on behalf of the plaintiff, that the above recited clause only extended to and meant cases on mesne process, which were generally cases of importance, and where all the proceedings were in writing, and the pleadings in due form of law. In all such cases, the act allowed an imparlance in order to give the parties an opportunity of drawing up and preparing their pleadings, and filing them within the rules of court, and in many cases of intricacy and doubt, justice could not be done without such indulgence.

Strange v. Evans.

But in cases on summary process, which were generally for small sums, and determined by the court without the intervention of a jury, and where all the pleadings were *ore tenus*, and where parties were heard on both sides, without reducing them to legal form, this indulgence was not necessary; and so far from being in furtherance of justice, it would only amount to a delay of justice. That as to the practice of the circuit courts on the construction of the above clause, some judges had conceived themselves bound by the law to allow the imparlance, while others again refused it, so that it had really been fluctuating and uncertain; but the best rule was, to give the clause such a construction as would rather expedite than delay justice.

The Judges had been aware of the uncertainty and doubt which had prevailed occasionally in our courts on this point of practice, and indeed of the contradictory decisions which had at different times been made upon it; and expressed their surprise, that some case had never been brought up before to the court of appeals to have it settled. They were, therefore, glad of an opportunity of putting this point at rest. Three judges, GRIMKE, JOHNSON and TREZEVANT, were of opinion, that no imparlance ought to be allowed as a matter of course in summary process cases, as the very nature and design of the clause in the act of 1789, giving the court this jurisdiction in small cases, intended that the determinations should be speedy, and that the parties should not be hung up or delayed in these summary causes; but that where justice required it, the courts would always allow either party to put off such a case, upon reasonable grounds shewn, as in cases at issue on mesne process.

Mr. Justice WATIES said, he had formerly been in the habit of allowing this imparlance, but, upon mature consideration, he thought the opinion of the majority of his brethren was the most correct one.

Strange v. Evans.

BAY, Justice, absent at the argument, but afterwards accorded with his brethren, although he also had been in the habit of allowing the imparlance, as he had known it frequently allowed while at the bar, before he came on the bench.

The rule for setting aside the decision of the circuit court was, therefore, discharged, and the judgment confirmed.

Charleston District, 1801.

RICHARD ASHE and CATO ASHE, devisees of JOHN ASHE, deceased, *against* GEORGE DENNIS.

An executor's refusal or omission to file his plea of *plene administravit*, with a view of subjecting lands to sale for payment of debts, will not deprive a judgment creditor of selling any part of the lands of the estate which are made chattels for payment of debts in this country, nor will a purchaser's title be affected by such omission.

TRESPASS to try title to a lot of land in *King-street*, in which there was a verdict for defendant.

Motion for a new trial.

The case was as follows. *Daniel Ward*, a creditor of the deceased *John Ashe*, brought his suit for the recovery of a debt, and obtained judgment against the estate of the deceased, upon which an execution issued, and the lot in question was seized and sold by the sheriff of *Charleston* district, in satisfaction of this debt, at which sale the defendant was the purchaser, who obtained regular titles from the sheriff, and afterwards built and made considerable improvements on the same.

The plaintiffs were devisees under the will of *John Ashe*, the testator, who had devised this lot specifically to them, with other parts of his estate. It was on this *specific devise* that this suit was founded.

On the trial of this cause, it was urged, that *John Ashe*, the acting executor, had not filed his plea of *plene administravit*, in the suit with *Ward*, by which it would have appeared that there were negroes and personal property enough,

Ashe v. Dennis.

and more than sufficient, to have paid off all the debts of the estate, and to have left a considerable overplus, by which means the lands, and in particular this specific devise, would not have been affected by this judgment and execution.

The judge (GRIMKE) who tried this cause, directed the jury to find a verdict for the defendant, on the ground that a *bona fide* purchaser at sheriff's sale, had nothing to do with the conduct or misconduct of an executor of an estate, who suffers a judgment to go against him. That it was his fault not to file a plea, in order to save the real estate from the effects of the execution, and to bring forward chattels or personal effects for that purpose. But whatever that misconduct might have been, a *bona fide* purchaser at a sheriff's sale, who purchases and pays his money, and who builds upon and improves the premises, ought not to be at all affected by the omissions or neglect of the executor. The jury found agreeably to the judge's charge ; and this was a motion for a new trial, for misdirection, &c.

Mr. *Baily*, in support of this motion, relied on the old rule of court, requiring executors to file the account of their administration, with their plea of *plene administravit* annexed, by which it might appear, that all the personal assets of the estate of the deceased were expended, before lands were to be sold for payment of debts, and insisted, that unless this rule was strictly adhered to, heirs and devisees might be defrauded out of their estates devised to them by testators ; and that in the present case, the personal estate of the deceased was large and ample, much more than sufficient to pay off all his debts, as would appear by the appraisement and return into the ordinary's office. That unless this rule was observed by executors, the mischiefs might be great and serious, and more especially to minors, who might be ruined by the neglects and omissions of executors, and it was much better that estates should make good all damages which might arise in a case like the present, than that de-

visees should be deprived of the benevolent intentions of a testator.

On the part of the defendant, against the motion, it was urged, that the right of *honest creditors*, and *bona fide purchasers*, under sales made by *operation of law*, in pursuance of judgments and executions, were as high and as much deserving the attention of the courts of justice, as the rights of heirs and devisees. That the latter were acts of bounty, but the former acts of justice, and it was an old adage, that a man ought to be just before he is generous; nay, the former claims stood in a much higher degree than the latter. It was admitted that the old rule of court did require executors and administrators to file their accounts of administration, with their pleas of *plene administravit;* but this was intended for the benefit of estates, and those claiming under the testator, and to justify executors, and to shew that they had no effects in their hands to pay debts; and if the executors or administrators should be regardless of their own conduct, as well as of the interests of the estate, and those claiming under the bounty of a testator, that was no reason why creditors should be deprived of their rights, which were paramount to the rights of heirs or devisees. Neither the rule of court, nor any other regulation of practice, can alter the law of the land, which subjects lands in this country to the payment of debts, whatever the line of conduct of executors may be in the exercise of their duty; for it is clear if an executor will not produce personal estate, any land that can be found must go for the payment of just debts.

The Judges, after considering this case, observed, that it is always in the power of an unwilling executor, if he pleases, to keep personal estate out of view, so as to prevent a sheriff from seizing or selling them in satisfaction of an execution. Whereas, that cannot be done with real estates; they are, therefore, a surer pledge for satisfaction of creditors than any kind of chattels; and they are made chattels in

Ashe v. Dennis.

this country for payment of debts; and it was by no means unfrequent that executors chose to retain negroes, who compose the principal part of the chattels of this country, in preference to land, as a more productive kind of property; it would, therefore, be extremely unjust, to keep a creditor out of his money, under these circumstances. The rule of court (as has been very properly observed) was made for the advantage of estates, under an idea that it would be most for the interest of an estate, to exhaust chattels before lands were disposed of, for the benefit of those interested in it; and for the satisfaction of executors, to shew they had no effects in their hands to pay debts. But, if executors were negligent in filing an account of the estate, with their pleas of *plene administravit*, by which, it might appear, they had exhausted all the chattels of the estate, that was no reason why just creditors should be delayed; and if heirs or devisees are injured by it, let them look to the executors for any damages which may arise from their misconduct. *Bona fide* purchasers at sheriffs' sales, were not to be affected by their omissions or neglects.

Rule for new trial discharged.

Present, GRIMKE, WATTS, BAY and JOHNSON.

MARTHA SURTELL *ads.* WILLIAM BRAILSFORD.

Charleston District, 1801.

UPON a motion to set aside a judgment on the ground, that the bond on which this judgment was obtained, was given by defendant while she was under coverture.

On the inspection of the record and proceedings in this case, it appeared that judgment by default had been obtained in this case, in *September* 1789, which had been duly entered up, and remained unsatisfied till the present day.

Mr. *Cheves*, for defendant, produced her affidavit, in which she swore that at the time this bond was given, she was a married woman and under coverture; although it was alleged that her husband was since dead, and she was then a widow.

For the plaintiff, in reply, it was urged, and it was not denied, that at the time when the defendant gave the bond in question, she carried on business as a milliner and shop-keeper in her own name publicly in *Broad-street*, as a *feme sole* dealer, and continued to do so ever since; and had during all that time, transacted business as a *sole* dealer in her own name, without her husband's ever being known, or in any way whatever interfering with her business.

Mr. *Cheves*, in her behalf, proceeded in his motion, and contended, that coverture was a good ground for setting aside the proceedings in this case, as it was well known in law, that the acts of a married woman were void, as her civil capacity as to contracts was so incorporated with that of her husband that she could make no valid contract whatever, and that if she did presume to enter into any, it was *ipso facto* void.

That this was one of the grounds for reversing proceedings in error, but as no writ of error had been allowed in this country, all the advantages which could in *England* be

A married woman keeping a shop and carrying on trade in her own name, and on her own account without the interference of her husband for a number of years will constitute her a *sole* trader at common law.

Coverture ought to be pleaded in abatement; it is too late to make it a ground for a motion to set aside a judgment 12 years after it was entered up.

No writ of error allowed in this state, as every advantage which could be derived from it may be taken on motion in the constitutional court of appeals.

Court will not unravel proceedings or judgments after several years acquiescence.

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derived from it, ought to be allowed on motion in this court, which among other great objects of its jurisdiction was the proper court for the correction of errors. In fact, he said, errors and appeals were the great branches of its jurisdiction which was secured by the constitution to the citizens of this country, and that there was no other mode of getting redress in all cases of error but by motion in this court.

He then proceeded to shew, in what cases error in *England* would lie, and that this was expressly one of the cases contemplated by all the books for reversing proceedings in error, and for that purpose cited *Salk.* tit. *Error. Bac.* tit. *Error. Barnes's Notes*, 270. 2 *Will.* 3.

Mr. *Pringle*, on the same side, quoted Mrs. *Rippon's* case, who was discharged after she was taken on a *ca. sa.* on the ground that she was a married woman; he also quoted 2 *Bac.* tit. *Error*, 487. but said, the case in 2 *Will.* 3. cited by the counsel who had preceded him, was so strong, that it would be a waste of time to quote more authorities on the occasion, where it is expressly laid down, that a judgment confessed by a *feme covert* is void, and so is her bond.

Mr. *Simmons*, against the motion, admitted that the general position was true, that the contracts of a married woman were void, and that many adjudged cases in the books, and some in our own courts supported and proved the general doctrine of the law on that head; but to this general rule of law there were exceptions; as where a married woman carries on trade by herself, in which her husband does not intermeddle, and buys and sells goods in that trade, she shall be considered as a *feme sole* at common law, and shall be liable on such contracts; *Cro. Car.* 69. *Show.* 184. *Skin.* 67. *Lev.* 131. and this point had been determined in this court after solemn argument in the case of *Newbiggin* v. *Pillans and Wife*; so that he considered that case as settling the law upon this subject. As to the facts of this case, it was notorious and would not be denied, that

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the defendant carried on business as a milliner and shop-keeper in *Charleston*, as a *sole* dealer for ten or twelve years, and upwards; and no person ever knew or heard of her having a husband, until her affidavit was brought forward on the present occasion; and this husband, if he ever existed, never was in this country, but died in *England*, so that he never intermeddled in her trade and shop-keeping business; that she is to be considered as a *feme sole* dealer at common law, to all intents and purposes, and liable as such.

Another ground, he said, on which this motion should be rejected, was, that it was too late after a lapse of twelve years. He admitted, that the writ of error was unknown in this country, but said that every possible advantage which could be derived from that process in *England*, might be taken advantage of in this court on motion.

This court has by the constitution, a general and superintending power and control over all the other courts in the state, to reverse and set aside all irregular proceedings, and to correct all errors and mistakes in pleading, and in the conducting of suits, provided such motions are brought forward in a reasonable time, agreeable to the rules and regulations prescribed for that purpose. But if persons would lay by, and not avail themselves of this advantage in due time, it is their own faults; they have themselves to blame for it.

Previous to the passing of the state constitution, an adjournment day was allowed after the conclusion of every term, which did not exceed twenty days after the end of each court, for bringing forward before all the judges, all motions for the correction of errors and rectifying mistakes, or for the advancement of justice, as the parties might think proper; here was a legal and proper opportunity allowed by law for all such motions.

This was thought so important a tribunal in this country, and so necessary for the great ends of justice, that the citizens of this state, in forming the constitution would not let it longer depend on an act of the legislature, which might

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be altered at pleasure, but erected and created a new tribunal, composed of all the judges in the state; to which an appeal might be made from all the other courts of the state for justice, agreeable to law, on all points whatsoever. This is the dernier resort of all the citizens. This is also a tribunal for the speedy determination of all law points, (without that delay which is experienced in some countries to the reproach of justice,) and to this court the defendant might have appealed in time if she had any justice in her case, but it is now too late; the rules require that at the next sitting of the constitutional court, after the conclusion of every circuit court, every party, or attorney who may think proper to bring forward any point of law, for the determination of the court, shall give notice of his grounds in writing, on which he intends to rest his motion, to the opposite party; and shall also furnish the judges with briefs, setting forth the nature and circumstances of this case, on the first day of the sitting of the court of appeals at *Columbia*, and three days before the meeting of the court in *Charleston*. And the parties bringing forward such cases, are required to enter their cases with the clerk on the paper of causes or docket to be kept for that purpose; and in every case where such notice is given, the attorney who gives it shall prosecute his case to a decision, agreeable to his notice; and if he does not, then the adverse party is to be at liberty to proceed as if no such notice had been given; no further delay is allowed, unless upon good cause shewn to the court, a further time is given for that purpose. These are the rules by which this court is governed; and if parties will not conduct themselves agreeably to them, they are forever afterwards excluded.

Has the defendant then complied with these rules? It is not even pretended that she has; but, on the contrary, has suffered judgment to pass against her, and has allowed it to remain unsatisfied for twelve years; and now, at this distant day, she comes forward to have it vacated. At this rate, a party might as well come forward at the distance of 20 years, or at any future indefinite period.

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Besides, he observed, that if the court would only once open a door, and make a precedent of unravelling and setting aside judgments after such a length of time, for errors and mistakes which ought immediately to have been corrected, after the time when the proceedings were filed, the time of the judges would almost be wholly occupied in revising and examining old judgments; there would be no end to applications of this kind. The court, therefore, he said, ought to set their faces against cases of this motion, as tending to render all judgments insecure and uncertain. He also observed, that such a proceeding would be opposed to all the statutes of jeofails, made to secure verdicts and judgments.

Another principal objection to setting aside these proceedings was, that coverture ought to have been pleaded in abatement, and as it was not, it is now too late to take advantage of it. 3 *East*, 631. Lord *Kenyon* expressly lays it down, that coverture should be pleaded in abatement, when a married woman is either plaintiff or defendant.

As to Mrs. *Rippon's* case, she was a *feme sole* dealer, but in the bond on which she was sued, that was not stated or mentioned; the bond was from *Barnard Rippon* and wife, and judgment was entered up against *Rippon* and wife, and after she was taken on a *ca. sa.* on motion, she was discharged, because in no part of the proceedings was it stated that she was a sole dealer; but the plaintiff had leave to go on against the husband.

In the present case, the husband's name is not mentioned, even for conformity sake. He was utterly unknown, and it was not even clear that she ever was married; and there is nothing but her own affidavit to that fact, which would not have been evidence on a trial to prove coverture.

The Judges, after duly considering this case, were of opinion, that the motion should be refused, on the ground that it evidently appears from the circumstances of this case, that the defendant kept a shop, and carried on business in her own name, apart from her husband, (if she ever had

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one,) and in which he never intermeddled for the space of ten or twelve years, which constituted her a sole dealer at common law, as was determined in the case of *Newbiggin* v. *Pillans and Wife*; consequently, as such, she was liable on her own contracts.

Secondly. That coverture ought to have been pleaded in abatement, as laid down by Lord *Kenyon*, in 3 *Durnf. and East.*

And, lastly. Because it would be a most dangerous thing to set aside a judgment and proceedings twelve years after final judgment was signed and entered up; there would be no end to applications of this sort, if once a precedent was established for that purpose. That the writ of error was unknown in this country; it never was in use, and indeed it is totally unnecessary, because every advantage which could be derived from that process may be obtained by motion in this court, if its rules and proceedings are adhered to; but if parties will not bring themselves within those rules in time, it is their own faults, and they must abide the consequences of it.

Let the rule for setting aside the judgment in this case be discharged.

Present, GRIMKE, WATIES, BAY, JOHNSON and TREZEVANT.

CASES

ARGUED AND DETERMINED

IN THE

CONSTITUTIONAL COURT OF APPEALS,

OF THE

STATE OF SOUTH CAROLINA.

IN THE YEAR 1802.

JANUARY TERM, 1802.

THE much lamented death of Judge RAMSAY, happening the latter end of the year 1801, the Honourable JOSEPH BREVARD, of *Camden*, was elected by the two branches of the Legislature in his room, and he took his seat on the Bench, as one of the Common Law Judges of this State, in *January*, 1802.

DUNCAN M'RAA *against* ISAAC SMITH.

Columbia, 1802.

MOTION for new trial.

Possession of land five years under a sale from defendant, who has a judgment against him, will be a good bar against a judgment creditor, or those claiming under him, who has laid by that time without renewing his judgment, or bringing suit against such possessor.

The lien which a judgment gave on the land, is lost by the sale of defendant to a third person; and a quiet possession under it for the space of five years, bars any action for the recovery of it.

This was an action of trespass to try the title to a lot of land in the town of *Camden*, before WATIES, J. in which

M'Rae v. Smith.

there was a verdict for the defendant. Plaintiff moved for a new trial, on the ground of misdirection, and as a verdict against law.

The case was as follows: Col. *Thomas Lide*, in his lifetime, to wit, in the year 1786, obtained a judgment against *Fielding Woodroof*, then an inhabitant in *Camden*, to whom the lot in question belonged. The plaintiff, Mr. *M'Rae*, who had administered on Col. *Lide's* estate, with the will annexed, in the year 1797, had this judgment revived against *Woodroof*, and by virtue of an execution this lot was sold at public sale by the sheriff of *Camden* district, at which sale the plaintiff was the purchaser, and in support of his title, he produced the sheriff's deed for the lot, and there rested his case.

The defendant, *Smith*, claimed under *Caspar Schutt*, who had purchased from *Woodroof* in the year 1788; and he, *Schutt*, and the defendant *Smith* under him, held and possessed the premises from the time of *Schutt's* purchase, down to the time of the commencement of the present action; so that the question between the parties was, who should have the lot, the plaintiff under the sheriff's deed, or the defendant by virtue of his possessory right? The conveyances from *Woodroof* to *Schutt*, and from *Schutt* to *Smith*, were put entirely out of the question. The defendant relied entirely on the statute of limitations for his title.

The presiding judge who tried the cause at *Camden*, stated, that he had charged the jury in favour of the defendant, and told them that judgments as well as executions might be barred by the statute of limitations, as they were within the mischiefs intended to be guarded against by the statute, although not particularly mentioned in it; but that it must be understood to extend only to possessions under *bona fide* sales for valuable considerations, where there is no fraud or collusion between the purchaser and defendant, to cheat the judgment creditor, as had been too often practised in many parts of the state; which, however, had not been alleged in

the present case. The jury, agreeably to the judge's charge, found for the defendant.

This case was argued by Mr. *Blanding* and Mr. *Falconer*, for the plaintiff; and by Mr. *M'Credie*, for defendant.

In support of the motion for a new trial, it was contended, that by the common law, judgments bound without limitation of time, and that every subsequent purchaser from the defendant took the lands subject to any prior judgment; that the statute of limitations was in derogation of the common law, and therefore should be so construed as not to affect common law rights, unless expressly declared in the statute; that there were no words in the statute which included judgments, or which could be construed to impugn in the smallest degree their binding efficacy; that the judgment gave a lien or mortgage on the land, which nothing but payment could remove, and there was nothing in the statute of limitations which took away or impaired this lien.

That a judgment was matter of record which was of public notoriety, and due notice to all the world; therefore, the defendant could not plead any thing like surprise; he must have purchased with his eyes open, and under a full knowledge of the circumstance of the lot being bound by the judgment. It was, therefore, his own fault in purchasing lands which he knew were encumbered, without seeing the encumbrance removed.

They admitted, that if the plaintiff, Mr. *M'Raa*, had not brought his suit within five years after he got the sheriff's titles for the lot, he would have been barred, because the land was no longer bound by the judgment; the lien had been removed by the sale, and the estate was vested in the plaintiff by operation of law, and his suit for recovery of it is within five years, the time allowed by law for bringing his suit, so that there was nothing to prevent his right of action.

M'Rae v. Smith.

For defendant, against the new trial, it was not denied, that judgments bound the defendant's property without limitation of time, as long as the fee of the land remained in him, but the moment he sold and conveyed it away to another, the statute of limitations came into operation; not to defeat the judgment against the defendant, but to protect the *bona fide* purchaser in the quiet enjoyment of the property purchased, and five years' peaceable possession without suit gave him a title against all the world, except persons beyond seas, *feme coverts* and infants, and it was upon this ground the defendant rested his title. *Schutt*, under whom he claimed, purchased in 1788, and he held two years, and sold to defendant, who has possessed ever since, so that here is nine years' peaceable possession after *Woodroof's* sale, which is four years more than the act of limitation requires. Under the statute, therefore, the defendant is unquestionably protected.

The act of limitations, it was said, made a great alteration in landed estates in this country, and in many instances altered the common law entirely. The law of descents and inheritances, one great branch of the common law, was in many instances altered by the operation of it, as five years' quiet possession of land will cut off the descent from the ancestor to the heir at law, and prevent him from inheriting. If, then, so great a change in the common law is effected by the operation of the statute of limitations, is it to be considered as strange and unreasonable that it should equally affect the *lien* on land, when the land itself, and the right of the fee, is changed by its operation, and transferred to a peaceable possessor? It surely is not. It is because men sleep upon their rights, that the act carries it away from them. Here eleven years had passed away, after this judgment had been entered up, before it was renewed by an administrator; a length of time quite long enough to presume the judgment had been paid off or settled, during all which time, or nearly so, the defendant had been in the quiet enjoyment of the premises, and had made many valuable im-

provements upon the lot, and expended large sums in the construction of them. It would therefore be extremely unjust, that the plaintiff should run away with the fruits of so many years of the defendant's labour. The counsel then urged, that the court was bound to give a favourable construction to the act, in order to support his client's right.

The Judges, after maturely considering this case, were unanimously of opinion, upon the true construction of the limitation act, that the motion for a new trial should be refused. The act declares, "that any person or persons to "whom any title to lands shall descend or come, who do not "prosecute such right to the same within five years after "such right or title accrued, all such persons, and all per-"sons claiming under them, shall be for ever barred from "recovering the same." After which period the right and title of the occupant is completely and fully established, except in cases where there are *feme coverts*, infants, or persons beyond seas, who have respectively a further time for bringing such actions; but there were none of those exceptions in the present case.

Lide's judgment could not possibly have given him a higher or better claim to the lot of land in question, than an absolute conveyance from *Woodroof* would have given him, yet it is very clear that if *Woodroof* had made him such conveyance in 1786, and another to *Schutt* in 1788, who immediately thereafter entered, and *Lide* and those claiming under him had not brought their action against *Schutt* or *Smith*, to turn them out of possession, within five years after their entry, the right would have been gone for ever; or, in other words, the act would have been a perpetual bar to it. If *Woodroof* had never conveyed to *Schutt*, or any other person, the judgment would certainly have bound the land without limitation of time; but as he had conveyed the fee in this case to a *bona fide* purchaser, the act comes in aid of such purchaser, and secures his title after five years' quiet possession.

M'Rae v. Smith.

The great policy of this act is to quiet possessors in their claims to lands which they occupy, and therefore such possessions have always been highly favoured in this country, not only on account of the improvements which may have been made on such lands, but for the prevention of suits and litigations; and therefore it has been determined, over and over again, that possessory rights are good against grants under the seal of the state, and against absolute conveyances for valuable consideration. If so, then judgments and executions, which are only inchoate rights, cannot possibly have a higher or greater validity than absolute and unconditional ones. Upon this ground it was that the case of *Cholett* and *Hart* was determined, after solemn argument, that four years' possession of sundry negroes, sold by a defendant some years after a *fieri facias* had been lodged in the sheriff's office against him, should secure the right to the *bona fide* purchaser and possessor, notwithstanding the lodging of the execution, which had not been renewed for several years.

See *ante*, p. 156.

Rule for new trial discharged.

All the judges present, viz. GRIMKE, WATIES, BAY, JOHNSON, TREZEVANT and BREVARD.

JOHN SNEE *against* MEREDITH TRICE. *Columbia*, 1802.

MOTION for new trial.

This was a special action on the case, tried at *Columbia*, in *Richland* district, for the value of three hundred bushels of corn, which was burned in a crib, owing to the misconduct of defendant's negroes, as alleged.

A master is not answerable in damages for the unauthorized acts of his negroes, or where done without his knowledge or approbation. But in all cases in the way of trade, or any public employment, or where a confidence is held out to the public, he is liable in damages to the party injured.

The case was briefly as follows: *Trice*, the defendant, had hired a field, which had been planted the year before with corn by the plaintiff *Snee*, in which stood a crib or corn-house, where the plaintiff had stored his crop of corn the preceding year. Early in the month of *March*, while the defendant *Trice* was clearing up this field preparatory for his planting his ensuing crop, his negroes, who were engaged in this business, made a fire in the field, as is usual among negroes; which, it is likely, was at no great distance from this corn-house. The morning, it appeared in evidence, was still and quiet, but towards the middle of the day the wind blew up fresh, which is very common at that season of the year, and communicated the fire to some light combustible materials about this building, while the negroes were at work in a distant part of the field, and very soon reached the building, and burnt it down, and the corn in it. Every possible exertion was made by the brother of the defendant, who happened about that time to be in the field, and the negroes, to save the house and corn, but to no purpose, as the progress of the fire had been too great before they could give any assistance to extinguish it.

This, therefore, was a suit for the value of this corn, between three and four hundred bushels, *upon the ground that this loss was occasioned by the negligence or misconduct of defendant's negroes.*

Mr. *Egan*, for the plaintiff, maintained, that a master was answerable for the misconduct and negligence of his servants, and if any injury arises to his neigh-

Snee v. Trice.

bour thereby, he is answerable in damages. That a master was liable for the acts of his servants, either expressly given, or *impliedly:* and further, that if a servant by his negligence does any damage to a stranger, the master shall answer for this neglect. 1 *Black. Com.* 432. And upon the same principle, it is, that by the common law, if a servant kept his master's fire so negligently that his neighbour's house was burned down, an action lay against the master. 1 *Black. Com.* 431. He further urged in his argument, that the master's permission to make a fire in this field, was an implied command, or order to do so; and therefore upon that ground he was liable. But on the ground of negligence, he said, he was clearly liable. That the negligence in this case was gross and shameful; first, in making a fire so near this building, where there were a great deal of light combustible materials; and again, in not putting it out (even if it had been necessary in a cold morning) when the sun advanced towards the meridian, and when they were going to a distant part of the field to labour.

Mr. *Starke*, for defendant, admitted, that whatever a servant does by the command of the master, the master is liable for; or even in cases of gross negligence, where a trust is reposed by the master in his servant, he is liable, and may be made to answer for such negligence.

But never in any case, where he gives no command either express or implied, or where no such trust is reposed, or where the negligence never came to the master's knowledge, till after the injury has happened, or where an accident occasions the injury, over which the master could have had no control. In the present case, he said, the injury was occasioned by an accident, owing to a cause which neither master nor servant could control; for several witnesses had proved in the course of the cause, that the morning was still and quiet, and that the fire which the negroes had kindled in the morning, had burnt down and was apparently extinct; but towards the middle of the day,

when the wind rose up fresh and strong, it blew up the slumbering embers, and communicated them to the corn shocks and blades, and other light materials, which ought to have been removed from about the house; and these communicated the flames to the building, which consumed it before any assistance could be made to extinguish them; and if it had not been for the high winds, no accident could have happened. Besides, he observed, it was well known to every planter in *Carolina*, that it was usual and customary, and had been so from time immemorial, for negroes to carry fire into the fields with them, sometimes for warmth, at other times for cooking their meals, and at all times for their tobacco pipes, of which they were so fond that nothing could keep them from the use of them; and he would be deemed a very hard and cruel master indeed, who would attempt to deprive them of the use of this article so essential to their comfort. He said, he mentioned these circumstances, (trifling as they might at first appear,) to shew that this was not a new thing, but a custom which pervaded *Carolina* from one end of it to the other; and that the defendant did not indulge his slaves in habits that were new and unusual, or which differed in the least degree from the indulgences allowed by every slave-owner in the country; therefore, negligence or want of usual care, could not in this instance be imputed to the owner; and the more especially, as he was not present in the field when they went to labour, and was absent from home all the fore part of the day, and did not return till after the accident happened.

He further urged, that in *England*, where this doctrine between master and servant was established, as laid down in the books, the servant was answerable to the master (in consequence of his wages or hire) for his neglects, and he might be compelled to make good to the master any damage arising from his misconduct. But in *Carolina*, where slavery is tolerated, no such redress could be had; and to establish a doctrine in the extent contended for on behalf of the plaintiff, would place every master in *Carolina* in the power of his slaves, who might by their misconduct ruin

Snee v. Trice.

him, when they pleased to combine together for that purpose.

The presiding Judge, (BAY,) in charging the jury, observed to them. that there appeared to be a wide difference between servants in *England*, who were responsible to their masters, and the negro servants in *Carolina*. There the consciousness of this responsibility, and their dread of the consequences, made them extremely careful and cautious. Here the slaves had nothing to pay damages with, and no suit would lay against one for any civil injury; therefore the common law doctrine in the books on this head, as well as in almost every other case, in which this class of people made one of the component parts of the matter in controversy, as in *torts*, trespasses and negligences, &c. were not, nor could they possibly be applicable to cases of that nature in *Carolina*. This country must, from necessity, therefore, be ever governed in every such case by principles adapted to the regulation of slaves, who were unknown in *Great Britain*.

If the doctrine laid down by Mr. *Blackstone* in the extent in which he has placed it, was to prevail in this country, to make masters liable for the negligences of their slaves, it would place all the slave-owners in the state at the mercy of their numerous slaves, who might commit what trespasses, or be guilty of what neglects and omissions they thought proper, to the ruin of their masters.

The policy of this country had, however, in most cases substituted other salutary checks where slaves commit offences, which upon experience had been found to ensure as great a degree of security against these kind of offences, as in most other countries, where damages in civil suits were in all cases resorted to for redress and satisfaction, without ruining their owners.

He then mentioned to them, that there were many cases, however, where masters were answerable for the conduct of their negro servants; as in all cases where negroes are permitted to perform any public duty, or to carry on any

handicraft trade or calling, or to perform or superintend any other kind of business where public confidence is to be reposed: as, for instance, keepers of public ferries. If negroes perform their duties so negligently or carelessly that a traveller's horse or carriage is lost or injured, the owners are liable; so if a negro blacksmith prick or injure a horse in shoeing, the master is liable; so also of a negro taylor who spoils clothes or embezzles cloth, or a negro miller who takes more toll than the law allows, &c. In all those cases the master is liable in damages for the misconduct of his slaves; but in no case, where any unauthorized act is done by a slave in his private capacity, without the knowledge or approbation of his master. That in the present instance, it did not appear that this injury was within any one of the rules in which masters were responsible, but that it was attributable to an accident, rather than to any other cause whatever.

Snee v. Trice.

The jury, however, contrary to the opinion of the presiding judge, found a verdict for the plaintiff to the whole amount of the value of the corn.

A new trial was moved for on the grounds that the verdict was against law, and the opinion of the presiding judge. Upon the argument of this motion, all the grounds which had been taken on both sides on the trial, were again taken and amplified, but no new ones insisted on by either party.

The judges after considering this case maturely, were unanimously of opinion, that this verdict should be set aside, and a new trial granted. They considered this as a new case, and one involving in it principles of very serious import, to the planters and all other slave-owners in *Carolina*. They observed, that the rigid doctrine relating to masters and servants in *England*, where masters were answerable for the neglects of their servants, and the servants

Snee v. Trice.

were again answerable to their masters, was by no means applicable to the local situation and circumstances of *Carolina*, where almost the whole of our servants are slaves. They were in general a headstrong, stubborn race of people, who had a volition of their own, and the physical power of doing great injuries to neighbours and others, without the possibility of their masters having any control over them; especially when they happened to be at a distance from them; and experience had taught us how little they adhered to advice and direction when left alone. It would, indeed, under these circumstances, be a most dangerous thing, to make their masters liable in damages for the unauthorized acts of their slaves, to the extent contended for on behalf of the plaintiff. Other salutary checks have been found, by experience, more efficacious than that of recovering damages from masters. But in the present case, it does not appear that the negroes themselves had been guilty of any intentional act to injure the plaintiff in this action; they had only conformed to the common and usual custom of the country, in carrying fire into the field where they were going to labour; and it is a very doubtful point, whether they were to blame or not. The morning was still, and the fire had burnt down, but towards the middle of the day, the wind arose, and blew up the sleeping embers which communicated the fire to the building; this, therefore, had more the appearance of accident than negligence. But be that as it may, the master, Mr. *Trice*, knew nothing of it; he was from home and did not even hear of it until his return. To make him therefore chargeable, would be very rigorous and unjust.

They admitted the doctrine of responsibility of masters, for the acts of their servants, in all cases in the *way* of *trade*, or any *public employment;* or where any *injury* was occasioned to another, by any *act done* by a *servant* in *pursuance of his master's directions.* In all these cases, the master is liable for the act of his servant in damages occasioned by the misconduct of his slave, but not for any un-

authorized or casual act committed without the knowledge or approbation of the master.

Snee v. Trice.

Rule for new trial made absolute without costs.

All the Judges present.

WILLIAM H. GIBBES *against* WILLIAM B. MITCHELL.

Charleston District, 1802.

MOTION for new trial.

This was an action of debt on bond, tried at *Colleton* district, before BAY, Justice.

It appeared that this bond had been given for the purchase of a number of negroes, and that the defendant had given a mortgage upon them to secure the consideration money. After the expiration of the time for payment, the money being unpaid, the plaintiff, *Gibbes*, went to the plantation of the defendant, and took away a number of the negroes mentioned in the mortgage, and sold them towards satisfaction of his debt; but as the proceeds did not pay off his debt, he went on for the balance unpaid upon this bond.

To this action the defendant pleaded a very large discount; 1st. For entering his plantation, and forcibly taking away a number of negroes; 2d. For consequential damages, occasioned by the loss of their labour, and the failure of the crop; and, 3d. For money had and received to defendant's use, arising from the hire and labour of those negroes while they remained in his possession, and for other damages mentioned in the discount.

When the cause was called in the order of the docket for trial of issues, the defendant produced an affidavit to postpone it; in which it was stated, that he had one or two material witnesses absent, who had been subpœnaed but did not attend, and without whose testimony he could not

Torts and trespasses, &c. are not discountable under our discount law; only money transactions or mutual accounts, &c.

And where torts, &c. are blended with accounts and money matters, the court will oblige a defendant to dicriminate between them in an affidavit to put off a cause on account of absent witnesses, that it may appear that the defendant intends to support by them only such parts of his demand as are legally discountable; otherwise the plaintiff may proceed and go on with his cause.

Gibbes v. Mitchell.

safely proceed to trial, or be able to substantiate the articles in his discount.

Mr. *Ward*, for plaintiff, objected to this affidavit, as he alleged there were a great number of items in this discount, which in their nature were not discountable under our discount act; and that the defendant had not discriminated in his affidavit, which of the items he meant to substantiate by his absent witnesses; for if by them he meant to prove *trespass*, or *tort*, or *any matter sounding in damages*, the cause ought not to be postponed on that account, as these did not come within the purview of the discount law; but if he meant to prove money had and received, or any thing of a pecuniary nature, it did come under it; that unless the defendant would discriminate in his affidavit, and state particularly what he meant to prove, he was not entitled to a postponement.

Mr. *Cheves*, for defendant, insisted that *trespass* and *tort*, and *consequential damages*, came within the meaning of the act, as well as money or any other pecuniary transactions; and, therefore, the defendant was under no obligation to discriminate, as it is full and complete to the common intent of postponing a cause.

But the presiding Judge (Bay) was of opinion, that all that part of the discount filed, which consisted of torts, trespasses, or matters sounding in damages, were all inadmissible under the discount law, although money had and received was so; and, therefore, unless the defendant would discriminate, and point out what parts of his discount he meant to support by his absent witnesses, he was not entitled to a postponement of his cause; which the defendant refusing to do, the cause was ordered on to a jury, who found a verdict for the plaintiff.

This, therefore, was a motion for a new trial, on the ground that the judge had mistaken the law, in refusing to put off the cause.

The same grounds were taken for the defendant on this motion, which had been urged for him at *Colleton*.

Mr. *Cheves*, and Mr. *Gaillard*, argued, that *all matters* and *things* in right of the defendant, ought to be set off and discounted under the discount act; that it was so broad and comprehensive, as to include and comprehend, not only money transactions, but also every other right which a defendant was entitled to, or could recover in an action or suit at law.

Mr. *Ward*, and Mr. *Simons*, contra, contended, that the discount must mean money, or something springing out of the contract, where there were reciprocal covenants, but could never be construed to mean torts, trespasses or injuries, or unascertained damages, which were in their nature the subject of special actions, in order to ascertain the quantum of damages, which defendant was entitled to; that the words of the act were sufficiently explicit, "all accounts, "reckonings, debts, matters, and things in defendant's own "right *might be set off*." These, they said, must mean that all matters and things of a pecuniary nature *in numero*, might be set off. And chief justice *Ellsworth* had given this construction to the act in the federal court. And that the word "*balance*" mentioned in the act, could refer to nothing else but money, because this was the sum which the act says the jury shall give their verdict for.

If this, then, is the true construction of the act, the defendant was bound to discriminate in his affidavit, and shew which of the articles in his discount he meant to prove by his absent witnesses, as some were in their nature discountable and others not; and as he refused to do so, the judge acted regularly and legally in ordering on the cause to the jury; and the verdict ought to stand as the cause had been very properly ruled on to trial.

The Court was of opinion, that the judge in the circuit court at *Colleton*, was right in ordering on the cause to

Gibbes v. Mitchell.

trial, unless the defendant had discriminated in his affidavit, and shewn which of the items in his discount he meant to substantiate by his absent witnesses. That the discount law never meant, that torts, trespasses, or any unascertained damages should be set off. That it contemplated debts, dues and demands, of a pecuniary nature, or something springing out of a contract where there were mutual covenants which depended one upon the other, and no other kinds of discounts had ever been offered or allowed of in our courts of justice; otherwise, a variety of different and very opposite kinds of actions, or issues, might be blended together in the form of a discount, as slander, assault, trespass to freehold, and other cases sounding in damages only, which might perplex and harass courts and juries exceedingly, unless a proper line of discrimination was drawn. That the decision made in the federal court by the chief justice of the *United States*, was a wise and legal decision. That nothing could be discounted but money matters, and the term "*balance*" made use of in the act, was a strong corroborating proof of it, as that was the sum the jury was to find for the plaintiff; but the act goes still further, and says, that if the balance should be in favour of the defendant, then judgment shall be given for such sum as may be due to the defendant; which is a further proof of the intentions of the legislature, that money transactions only were alluded to in the act.

But as the practice on this point had never been before settled, and as there was in this discount a charge for money had and received, which came within the purview of the act, they thought it *best in this case* to allow a new trial, lest the defendant should be deprived of an opportunity of substantiating that part of his discount, which might work (if it was just) a manifest injustice to him.

Rule for new trial made absolute.

Present, WATIES, BAY, JOHNSON, TREZEVANT and BREVARD.

THE STATE *against* RICHARD GILBERT. *Columbia, 1802.*

UPON an indictment for a forcible entry and detainer. Verdict guilty. Motion for a new trial.

An indictment will lie upon a forcible detainer against a third person who intrudes himself on land, or enters after judgment against a former intruder. And the sheriff who is in possession of the writ of restitution, may turn him out of possession.

The defendant had been indicted for a forcible entry and detainer of lands belonging to the honourable Judge *Grimke*, in *Union* district. Upon the trial of this cause, it appeared, that *Thomas Brandon*, the father-in-law of the defendant, had been indicted for a forcible entry on the same lands at *Pinckneyville*, when *Union* county formed a part of the former district of *Pinckney*, some years previous to this trial; and when called upon to answer, pleaded guilty to the indictment, and judgment was entered up against him accordingly.

Some time after, however, by some contrivance between him and his son-in-law *Gilbert*, the present defendant, the latter was put into possession, or took possession of this land before any writ of restitution had issued at the suit of Judge *Grimke*. Indeed, from *Brandon's* pleading guilty to the indictment, which acknowledged the legal possession to have been in Judge *Grimke* before he entered, no writ was actually afterwards taken out against *Brandon*. But upon *Gilbert's* entry, a writ was issued upon that judgment; and the former sheriff of *Pinckney* district was obliged to raise the *posse comitatus*, as *Gilbert* and his wife, who were supported by *Brandon* and his adherents, resisted the sheriff in getting possession.

The sheriff, however, at length turned defendant and his wife out, and gave the peaceable and quiet possession of the house on the premises to one *Absalom Bobo*, the overseer or agent of Judge *Grimke*, who nailed up the doors and windows of the house, after which he returned home.

The next day, *Gilbert* and his wife returned, and opened the doors and windows of the house and entered again, and *Gilbert* declared that he would keep possession against all

The State v. Gilbert.

the world. This indictment, therefore, was for this second entry and detainer by *Gilbert*.

Mr. *Nott*, on the part of the defendant, urged, that the writ of possession had issued against *Thomas Brandon*, who had confessed the unlawful entry. That *Brandon* had relinquished the possession, therefore the writ was a dead letter as to him; he was not to be found on the land. And he was not answerable for the conduct of *Gilbert* the defendant, who might have a good title to the premises in question; and he ought to have his title tried before he could be dispossessed. That by turning him out, in this short handed way, he might be deprived of his possessory right, which might in time ripen into a good and legal title. He went peaceably into possession, and therefore ought to be evicted by suit at law, for trying title before he was turned out again.

Mr. Solicitor *Thompson* contended, that this was a mere contrivance or combination between *Brandon* and his son-in-law *Gilbert*, to harass and oppress Judge *Grimke*, who had bought this land at sheriff's sale, and had been in peaceable possession for some years before *Brandon* entered. That *Brandon* had turned out a Mr. *Simons*, a tenant of Judge *Grimke's*, before he took possession; but afterwards, he was so sensible of his misconduct, that he pleaded guilty to an indictment against him; upon which judgment had been entered up, and a writ of restitution had issued. When the sheriff, colonel *Bratton*, went to the premises to give possession to Judge *Grimke's* agent, he found the defendant *Gilbert* in possession, who, together with his wife, supported by their adherents, resisted the sheriff to such a degree, that he was obliged to raise the *posse comitatus;* and before he could get possession, was obliged to pull down part of the house; and had nearly lost his life, by a lunge from the defendant's wife, after he had entered the house, by a bayonet at the end of a pike staff, which in all probability would have killed him, had not his

eye caught the weapon while she was in the act of making this lunge, which enabled him to parry it off. These circumstances, he said, he only mentioned to shew the violence of the parties, and how little they deserved the countenance and support of a court of justice. That upon the whole, the conduct of the defendant was outrageous to the last degree. But what made it still more so, was the defendant's entering again the next day, and breaking open the doors and windows of the house, after the sheriff of the district had turned him out and given quiet possession of the premises to Judge *Grimke's* agent. That this conduct was not only an open and flagrant violation of the laws of the country, but would, if permitted to go unpunished, defeat this peaceable and quiet remedy of getting possession of lands, which had been forcibly entered on and detained by turbulent and violent men, in open defiance of all law and justice. And the kind of trick practised, if countenanced, would (independent of the violence offered on this occasion) entirely defeat the remedy; for it would only be for one intruder, after a writ of possession was issued, to abandon, and put in a stranger or third person, and then that stranger another, and so on, till there would be no end to these kind of practices and subterfuges, which would prove subversive of this salutary remedy, in open defiance of the authority of the courts of justice.

The presiding Judge, (BAY,) in his charge to the jury, mentioned, that this was the quiet and peaceable remedy which the law had wisely devised, to put men into the quiet and peaceable possession of lands, from which they had been driven and expelled, by high handed, violent and turbulent men, who did not choose to submit themselves to the rules of law, but rather chose to depend upon the strong arm of power and violence to support their rights. That perhaps a wiser and better remedy was never devised by men in civil society than the one now pursued, as it went to check broils and bloodshed, by arraying the power of the country against a bold, daring intruder, instead of leaving

The State v. Gilbert.

the quiet possessor, or injured man, to the necessity of taking justice by his own arm. That it was a well known maxim of law, that no man could recover lands but by the strength of his own title; it did not depend upon the weakness of his adversary's. It was well known also, that in this country, five years' quiet possession of lands, not only cured defective titles, but gave a man a title to lands who had no other claim but possession. Possession, therefore, was a matter of vast importance to the citizens of this country.

The kind of injury, therefore, which had been committed by *Brandon* originally in this case, was one of the highest which could be offered to the rights of landed property; as it had entirely changed the position of the parties, and would have made Judge *Grimke* the plaintiff in any action to try the title to the land in question; instead of *Brandon* being plaintiff, which would have been permitting him to have carved out for himself a presumptive title, by his own violent act, which the law abhors. This remedy, was, therefore, calculated to place the parties in their original situation, and to leave them to their mutual remedies at law without force or violence. That the conduct of *Brandon* in confederating with *Gilbert*, and that of *Gilbert* in being concerned in the execution of the plan concerted by *Brandon*, in entering into this land after the judgment against *Brandon*, was extremely reprehensible and illegal. For if it were once permitted for a defendant against whom there was a judgment, on a forcible entry and detainer, to put in a third person, or for a third person to enter afterwards, with a view of again putting a plaintiff's title to the rack, such third person might again in his turn, after judgment against him, put another into possession, or permit him to enter; so that there might be prosecutions without end, and the object of regaining possession by the plaintiff, would be as far off, as at the commencement of his first remedy, to regain his possession, to the utter subversion of all justice.

That the sheriff who had the writ of restitution, was well warranted in law, in turning out *Gilbert* or any other person

whom he found in possession of the premises, as the exigency of the writ commanded him to do; and *Gilbert's* entering again the next day after Judge *Grimke's* agent had obtained possession, was a high misdemeanor; with the additional aggravation, that it was done in open defiance of law, and the supreme authority of the country.

The jury without hesitation found the defendant guilty; and on the last day of the circuit court, when defendant was called upon to receive the sentence of the court, his counsel gave notice of a motion for a new trial at the next constitutional court of appeals at *Columbia*, on the ground of misdirection.

In support of the motion for a new trial, Mr. *Nott* took the same grounds which he urged on the trial at *Union*, when the court after hearing the arguments for the motion, thought it unnecessary to hear counsel against it, and were unanimously of opinion, that the rule should be discharged, as they concurred with the presiding judge on the trial in his construction of the law on this subject.

The defendant was then fined, and ordered to give securities for his good behaviour, but he absconded and soon after left the state.

Present, WATIES, BAY, JOHNSON, TREZEVANT and BREVARD.

Columbia, 1802.

THE STATE *against* JOHN DAWSON.

A negro dealing with the clerk of a shopkeeper, without a ticket from his master or owner, &c. is not sufficient to charge such shopkeeper on an indictment, unless the knowledge of the fact was brought home to him, or some general order proved for that purpose; though the clerk himself is chargeable.

UPON an indictment for trading with a negro, without a ticket from his master or person in whose charge he was, contrary to the act of the legislature in such case provided. Verdict, guilty. Motion for new trial.

On the trial of this case at *Georgetown*, it appeared that the defendant kept a small retail store in the neighbourhood, and that the prosecutor's negro had been seen carrying corn to this store, and *delivering it to a clerk*, who had the care of the store.

The *Attorney-General* then contended, that the evidence had brought the defendant clearly within the meaning of the act, which declares, "that if any shopkeeper, "trader, or other person, shall at any time after the passing "of the act, by himself *or any other person*, directly or in- "directly, buy or purchase from any slave in this state any "corn, rice, pease, or other grain, bacon, flour, tobacco, "cotton, indigo, blades, or any other article whatsoever, or "shall deal, trade or traffic with any slave whatever, not "having a ticket or permit so to deal, trade or traffic, or to "sell any such article, from the master or owner of such "slave, or such other person as may have the care and "management of such slave, every such person, shopkeeper "and trader shall, for every such offence, forfeit a sum not "exceeding two hundred dollars, to be recovered by bill, "plaint or indictment, one half to the informer, and the "other moiety to the state, in any court of competent ju- "risdiction in the same."

The *Attorney-General* then argued, that although the evidence had not proved that the defendant himself had received the corn, yet it was delivered to his clerk or storekeeper, who was the defendant's agent, and therefore it was presumable he had the defendant's orders for it, and consequently that he was chargeable under this indictment.

The State v. Dawson.

For the defendant, it was urged, that he was not present when this corn was delivered to the clerk; on the contrary, that he was from home at the time, nor was it proved that he had ever given orders or directions to his clerk to deal or traffic with the prosecutor's negro, or any other negro whatever; and, therefore, for aught that appeared on this trial, he might be as innocent of the charge as any man on the jury.

The presiding judge (WATIES) told the jury, that he thought the evidence not sufficiently strong to convict the defendant, without some knowledge of the fact had been brought home to him, or some general order or direction had been proved to have been given to his clerk for that purpose.

The jury, however, found him guilty of the offence; and this was a motion for a new trial, as a conviction without evidence, as well as against the charge and direction of the judge.

Per Curiam. There ought to be a new trial in this case, as there is no knowledge of this fact brought home to the defendant, nor any general directions proved against him; and although the prosecution might be maintained against the clerk who received the corn, yet there is no proof to charge the defendant, as was very properly laid down by the presiding judge on the trial.

Rule for new trial made absolute.

All the Judges present.

Columbia, 1802.

LAMB *against* HART.

Mechanics' and tradesmen's books are good evidence to prove their accounts, and should be put upon the same footing as the books of shopkeepers, &c.

CASE from *Camden*. Motion to set aside a nonsuit.

This action was *assumpsit* for work and labour, &c. In order to substantiate the demand of the plaintiff, who was a mechanic, he offered his book of original entries in evidence, and there being no other proof, he relied on those entries as sufficient proof of his demand. The defendant's counsel objected to the plaintiff's book of entries, inasmuch as the plaintiff was not a shopkeeper or merchant; that the act allowing even merchants' and shopkeepers' books as evidence was in derogation of the common law, and therefore ought to be strictly construed, and the principle should not be carried beyond the letter of the law.

The presiding judge (GRIMKE) was of this opinion also, and ordered the plaintiff to be nonsuited.

This was a motion to set aside this nonsuit, and to have the cause reinstated on the docket for trial at the next circuit court at *Camden*. When, after hearing counsel, it was determined by the court, that as it had been the practice during a long course of years past for the courts of justice in this state, under the equitable construction of the act, to put mechanics and all kinds of tradesmen on the same footing as shopkeepers, and to admit their books of entries as evidence to prove accounts, they did not think it proper to alter the rules of evidence, which had been so long established, but considered it, from long use, as part of the law of the land.

The same point was determined in the case of *Slade* v. *Teasdale*, tried in *Charleston*, *ante*, p. 172.

It was therefore ordered, that the nonsuit should be set aside, and that the cause should be again placed on the docket for trial at the next court at *Camden*.

All the judges present.

BLACKLOCK & BOWER *against* THOMAS STEWART *et al.*

Charleston District, 1802.

CASE on a policy of insurance. Verdict for plaintiffs. Motion for a new trial.

This was an action on a policy of insurance on the brig *Susannah* and cargo, on a voyage from the port of *Charleston* to *Cadiz*. The vessel proceeded on her voyage till she was near the place of her destination, when she was boarded by an *English* privateer called *La Mouche*, and sent into *Lisbon*. The brig's papers and documents were afterwards sent to *Gibraltar*, where she was libelled and condemned as a prize to the captors, on the ground that the captain of the brig had attempted to enter the port of *Cadiz* after due notice that the port was blockaded by a squadron of the *British* fleet.

If a ship or vessel be libelled in the court of vice-admiralty abroad on one ground, (as for being enemy's property,) and condemned on another ground, (as breach of blockade,) this is such uncertainty and ambiguity as will be a good ground for opening such foreign decree, and to suffer the parties to go into evidence on both sides.

No such decree is conclusive, but is re-examinable for uncertainty on the face of the proceedings.

The jury, after a full investigation of this cause, under the direction of the presiding judge, (JOHNSON,) who tried the cause, found a verdict for the plaintiffs.

And this was a motion for a new trial, on the ground, first, that the judge who tried the cause had misconceived the law of blockades, and had misdirected the jury on that head; and, secondly, that he permitted evidence to go to the jury which went to impugn or contradict the decree of the vice-admiralty court at *Gibraltar*.

Mr. *Desaussure* and Mr. *Ward*, on the part of the underwriters, in support of the first ground, contended, that the right of blockade was secured to every nation in time of war by the *jus gentium*. All states, both ancient and modern, had at all times both claimed and exercised this right of preventing neutrals from entering into a city or town besieged, either by land or water, or to carry any thing to the besieged without the permission of the besiegers. *Vattel*, b. 3. c. 7. s. 117. *Rob. Adm. Cases*, 154. By the 18th article of the treaty with *Great Britain*, the rigour of the law of nations is relaxed with *America*, so that if an

Blacklock & Bower v. Stewart et al.

American vessel should attempt to enter a port blockaded, besieged or invested, not knowing of such blockade, such vessel shall be warned and turned away without detention, unless after such notice she should attempt to enter again. That in the present case, it was alleged and stated in the pleadings, that the brig *Susannah* did approach the port of *Cadiz* in *Spain*, while a *British* squadron of ships was blockading that port, in order to prevent supplies going in to the enemies of *Great Britain*; and that she had been duly warned thereof, agreeably to the terms of the said treaty; but that in defiance of such warning, she did again attempt to enter the said port a second time, when she was captured as a lawful prize and condemned.

Upon the second ground, they urged, that the decrees or sentences of foreign courts of admiralty were not to be contradicted, but were conclusive and binding on all the world; and unless they were so, it would render the property of all the captures in the world fluctuating and uncertain. It is, therefore, a well established rule of national law, that these sentences were conclusive and binding on all persons interested or concerned. *Doug.* 554. *Park*, 356. 359. The admission of any evidence, therefore, in any degree to call in question, or render invalid such a decree, was against the general and well established rule of the law of nations.

That on this trial, such evidence had been permitted to go to the jury, which in effect rendered this condemnation nugatory; on both these grounds, therefore, they contended, that the court ought to order a new trial.

The *Attorney-General*, and Mr. *Parker*, in reply, admitted the doctrine and law of blockades as laid down by *Vattel*, and other writers on the law of nations quoted by the opposite party. They also admitted the conclusive nature of decrees and sentences in foreign courts of admiralty, as being binding on all parties interested, except in cases where there is *such obscurity* or *ambiguity in the proceedings, as to render it doubtful or uncertain, on what ground such decree is founded.* *Park*, 366. In all such

cases, they said, the decrees of foreign courts were open on both sides of the question, and the parties were at liberty to go into the examination of witnesses, to see how far such decisions were in conformity to the law of nations, or not?

In this case, they urged, that the libel and decree were at variance with each other, as would appear by an examination of them, a copy of which had been duly certified from the vice-admiralty court at *Gibraltar*. That the libel appeared to charge the brig and cargo to belong to the *enemies of Great Britain*, and therefore liable to seizure and condemnation; and the decretal part of the proceedings, was for attempting to enter a *blockaded port*, after being duly warned of a blockade by a *British* squadron of ships; and concluded with condemning her as *a lawful prize to the privateer*; so that here is such a manifest contradiction upon the face of the proceedings, such ambiguity and uncertainty, that no man could tell upon *which ground she really was condemned*, nor to whom *she belonged as lawful prize*. The point put in issue by the libel, was *enemy's property or not?* But the condemnation was for *attempting to enter a blockaded port*, which was not put in issue; and the final sentence was, that she was condemned as *a prize to the privateer* and not to the *blockading squadron*, which is a glaring inconsistency in itself. It was admitted, that if the brig and cargo had been libelled and condemned for a breach of blockade as a prize to the blockading squadron, or if she had been libelled as enemy's property generally, to the privateer, that in either of these cases, the condemnation would have been conclusive, but from aught that appears on these proceedings, no man can tell, with any kind of certainty, on what ground she really was condemned; for it is evident she was libelled on one ground, and condemned on another; and this creates such an ambiguity or obscurity, as leaves an opening for the parties on both sides, to go into evidence to support or defend themselves against the allegations contained in the libel. The law is clear, that if the sentence of a court of admiralty proceeds upon matter not

Bicklock & Bower v. Stewart et al.

put in issue before the court, it may be opened, and evidence admitted on behalf of the parties. *Park*, 353. 366. It was upon this ground, therefore, that the presiding Judge opened this decree and permitted the parties to go into evidence; when it appeared, from copies of the depositions taken in the case, and from other unquestionable testimony, that the port of *Cadiz* had been some time before blockaded by a squadron of *British* ships, but the fleet had been blown off, or for some reason or other had left the station. That the privateer after the fleet had gone off, gave information of it to the captain of the brig, but as there was no squadron of king's ships off the harbour at that time, the captain of the brig did not think proper to alter his port of destination, and was proceeding towards the harbour when she was captured by the privateer who sent her to *Lisbon*. Upon this point, the judge in charging the jury, told them, as long as the squadron of ships were off the port of *Cadiz* watching the motions of their enemy, it was lawful for any part of that squadron, after due notice agreeably to the treaty, if the brig attempted to enter the port afterwards, to capture and make a prize of her; but if such blockading squadron had left the station, for any cause whatever, and there were no ships of war left, it was lawful for a neutral to enter, and no single private armed ship or vessel had a right to stop or capture her.

That a constructive blockade, or a bare proclamation or declaration of an admiral, or other commanding officer, declaring a port to be in a state of blockade, without an actual force being stationed against it, was not a blockade within the meaning of the law of nations, but an arbitrary and illegal measure, unauthorized by any principle of national law whatever.

Upon the second ground, that of the property being neutral, it was proved beyond all doubt that the property of the brig and cargo was *bona fide American* property, belonging to the plaintiffs who were merchants of respectability in *Charleston*.

Upon this evidence, the jury, without any hesitation, had found a verdict for the plaintiffs, which the counsel said they presumed the court would not disturb or call in question.

Blacklock & Bower v. Stewart et al.

The Judges, after duly considering this case, were unanimously of opinion, that the new trial should be refused. The opinion of the court was delivered by Mr. Justice Waties, and is substantially as follows:

The question before us, is not whether the sentence of a foreign court of admiralty founded on a lawful ground, may be opened; there can be no doubt as to this point. If the ground on which the sentence proceeded, is valid by the law of nations, and it is set forth with sufficient certainty, we are bound by it, however partial or insufficient the proofs may have been; but all the authorities quoted, shew, that where the real ground is uncertain, evidence may be admitted to ascertain this, and of course the truth of the ground may be again examined.

This sentence states the ground of condemnation to be a *breach of blockade*, but the libel alleges as the only ground of confiscation, that the vessel and cargo are *enemy's property*. The sentence, therefore, proceeded on matter not in issue; for, although the monition charges the breach of blockade, yet the libel does not allege it, and the owners were only bound to answer the allegations contained in the libel; because, it is this part of the proceedings in the admiralty courts which contains all the grounds of confiscation and forfeiture, against which, the owners are bound to defend themselves.

It is analogous to a declaration at common law, which contains every matter which a defendant is bound to answer or plead to. It may be said, that this is a rigid construction, and it has been argued, that some indulgence ought to be shewn to the informalities of these inferior admiralty courts. I am not disposed to shew any indulgence to the late proceedings of the *British* prize courts. I will freely confess, that I had rather seek for some circumstance

Blackloek & Bower v. Stewart et al.

in a case like this, to justify me, in refusing to give effect to the sentence which has been given in this case, if it was necessary. During the late and present war between *Great Britain* and *France*, the commerce of the *United States*, was for a long time the common prey of the ships and privateers of both these powers, and still continue to be so. It was not so surprising that the *French* should plunder us, as for a long time they robbed indiscriminately, and seemed to think that the whole world was subservient to their use; but what excuse is there for a nation who professes to love justice, and to vindicate the rights of other nations? Who would have supposed, that *Great Britain* would have permitted corrupt and unprincipled courts to assist the rapacity of her cruisers, and to make plunder a system? One belligerent, may indeed, prohibit any intercourse with places belonging to another, which are besieged or blockaded; but the extravagant assertion of this right by *Great Britain*, was an unwarrantable obstruction of the trade of neutral nations, and a violation of their independence. How preposterous was it to attempt to blockade the whole *European* coast, from the *Texel* to the *Mediterranean*, besides all the islands in the *West Indies*, belonging to her enemies! and this was not more preposterous than wicked. She had a right to employ means which might compel her enemy to yield to just and safe terms, but an attempt to starve a whole nation could never succeed. It was a thing obviously impossible, and was therefore unwarrantable and unjust; it could only produce a partial distress instead of putting an end to the war, have the effect of increasing the exasperation of her enemy, and making his resistance more obstinate and determined. In a case, said to have been tried before Lord *Kenyon*, some time ago, in which the sentence of a foreign court of admiralty was pleaded, and a cause of condemnation stated, which if true was valid; he went the length of saying, "that notwithstanding the rule that "such foreign sentence was conclusive, yet as it was notori-"ous, that the proceedings of the *French* courts were "founded on the most outrageous and unjust pretences, he

" thought it deserved to be considered, whether the grounds " should not be re-examined."

We should be equally warranted in saying the same thing of some of the sentences of the *British* vice-admiralty courts; but the grounds in this case were sufficiently open to examination, without departing from the ordinary rule. The *libel* states *one ground*, and the *decree another*; we may therefore fairly inquire how far either was supported. If, as the libel states, the brig was *enemies' property*, this does not discharge the insurers, as there was no warranty of the property; but this was not attempted to be proved on the trial, and the sentence does not state it to be so. If, on the other hand, the ground of condemnation was *breach of blockade*, there was no evidence of this fact. The only notice of a blockade was given by the privateer, which afterwards captured the brig; and, from the evidence which has been read, there is reason to believe that there was no fleet or public vessel of war off the port of *Cadiz* at the time; and indeed the decree itself proves there were none, for the property is condemned for the use of the privateer, and not for the use of the blockading squadron, which, conformably to the *British* prize acts, it would have been if any fleet had then been upon that station. Upon either ground, therefore, the condemnation was unwarrantable, and the insurers are liable.

Rule for new trial discharged.

Present, GRIMKE, WATIES, BAY, JOHNSON, TREZEVANT and BREVARD.

PETER MULDER *against* PETER CRAVAT.

Charleston District, 1802.

Awards and umpirages are not to be set aside unless for corruption or misbehaviour in the arbitrators. Except only in cases of *gross errors* or *mistakes*, courts will always construe them *liberally* and not scan them too nicely, so as to defeat the ends of the referenee, but will lend every aid to carry them into execution.

MOTION to confirm an umpirage set aside by the circuit court for *Charleston* district.

This was an appeal from the decision of the circuit court of *Charleston* district. It appeared that the parties had, by a rule of court, submitted their matters in dispute to the decision of two arbitrators, to wit, *James Miller* and *Jacob Abrahams*, with liberty, in case of difference, of choosing an umpire. Upon inspecting the accounts between the parties, the arbitrators did differ, and they chose *Seth Lothrop* the umpire, who accordingly made his umpirage from the accounts and the testimony submitted to him. A motion was afterwards made in the circuit court in *Charleston* district to set aside this umpirage, which was done by that court. The present was, therefore, a motion to rescind the order of that court, and to confirm the umpirage made by Mr. *Lothrop*.

The grounds upon which the umpirage was set aside were, first, an affidavit made by *Abrahams*, one of the referees, that Mr. *Lothrop*, the umpire, had admitted a sum of money, one hundred and eighteen dollars, to have been paid by the plaintiff to the defendant, upon comparing the accounts between the parties in dispute; and, secondly, on the oath of the party himself, which, it was urged, was inadmissible testimony, by the well known rules of law.

In support of the present motion, it was urged by Mr. *Hagood*, that collusion and fraud were the only grounds upon which an award could be set aside at this day, and for that purpose quoted 3 *Atk.* 529. 2 *Esp.* 377. 4 *Term Rep.* 589. 1 *Bos.* & *Pull.* 91. 1 *Vez.* jun. 369.

That in this case there did not appear to be any thing like collusion or fraud, or any misbehaviour on the part of the umpire; who, on the contrary, appears to have acted according to the best of his judgment, and with sound discretion, too, in forming his opinion upon the best evidence

the nature of the thing offered. That in these kind of references, the arbitrators are not bound down by the strict rules of law and evidence, which govern courts of justice. They have a right to draw their information from the best sources it can be procured, and to judge of the whole of the circumstances, according to just and equitable principles, so as to put an end to the dispute between the parties; which is one of the great objects of all references and arbitrations. It is laid down, that by choosing private judges, the parties have placed the dispute beyond the reach of law; and the courts ought not to examine too nicely or minutely into their conduct, unless for *corruption*, *misbehaviour*, or going *beyond their powers;* as every person is left to his own discretion in the choice of these judges, neither party ought, after an award is made, to be permitted to come in and allege, as a ground for setting it aside, the want of honesty or understanding, or that they have not done him justice; because, he has precluded himself from making these objections, by his own choice, and by his own assent. And in every case where a power is given to the arbitrators, in case of disagreement, to choose an umpire, the parties are as much bound by the umpirage of such person, as if he had been chosen by the parties themselves.

Mulder v. Cravat.

2 *Ves.* jun. 22.

In opposition to this motion, it was not denied, but that arbitrators had great powers as to the matters submitted to their consideration, and that an ample field was open to them for the exercise of discretion; but still they were bound and restricted by the plain rules of law, and the obvious principles of justice; and if they violated these, although there might be no room for accusing them with fraud or misbehaviour, yet mistakes both of law and fact ought to be rectified. In the present instance, the oath of the party was admitted to prove his account, which was contrary to the plain rule of law, that no man shall be an evidence in his own cause: in this respect, therefore, it was said, that a plain rule of law had been violated, and that the court was bound, whenever that was apparent, to rectify it

Mulder v. Cravat.

by setting aside the umpirage, and leaving the parties in the situation in which the rule of reference found them.

The Judges observed on this occasion, that motions for setting aside awards and umpirages, had become very frequent and common of late; almost every man who was dissatisfied with an award, seemed to endeavour to get rid of it by some means or other, if possible. It therefore became the duty of the court, not to lend too easy an ear to complaints of this kind, or to set afloat decisions which had been made by judges of the parties' own choosing. Every man, who went into a court of justice in the prosecution or defence of a right, must know, that his case there will be governed by the strict rules of law. But whenever he consents to withdraw it from such court, and submit to one of those domestic tribunals composed of private individuals, who were not law characters, he consents that his case shall be no longer bound by the rigid rules of law and evidence, which prevail in a court of justice.

The individual referees, by his own nomination, become judges, jurors and chancellors in the case, and possess all the powers which come within the province, or compass of these respective functionaries; and unless they violate the principles assigned to each, and every of these great branches of law and equity, their decisions ought to be supported and maintained. The great principle, therefore, laid down by Lord *Hardwicke*, 3 *Atk.* 529. and which is supported by all the other authorities above quoted, is the best general rule which can be adopted: "That the only ground "to impeach an award, is collusion, or great misbehaviour "in the arbitrators; for, otherwise, being made by judges of "the parties' own choosing, it is binding and final on all the "parties; and unless it was so, no person would ever con-"sent to act as an arbitrator." But as all men are liable to *mistakes* and *errors*, this general rule must be subject to those exceptions. If, therefore, any great or *palpable error*, or *gross mistake* has been committed by arbitrators or an umpire, that may be a ground for opening such award or

umpirage. But the mistake must be *plain* and *gross*, to set aside the award. *Loft*, 554. A mere mistake in point of law, or error in judgment on the part of an arbitrator, does not appear to be grounds for impeaching an award or umpirage. Lord *Mansfield* says, that awards are not to be scanned with critical niceties, as they are made by judges of the parties' own choosing, and that much *greater latitude* and less strictness, are exercised now in construing awards than formerly; they are to be construed liberally and favourably; so that they may take their effect, rather than be defeated. 1 *Burr.* 277. Now to apply the foregoing case with these principles. The reasons assigned for setting aside this umpirage, are that the umpire had admitted 118 dollars to have been paid by the plaintiff to the defendant, upon no other testimony than the *comparing their accounts*, and the *oath of the party*. As to the comparison of accounts, had not the umpire, Mr. *Lothrop*, a right to examine them, and judge of them? That was the very thing he was chosen by the arbitrators for; and of which, he was to judge and determine; and not a single error has been pointed out, nor any mistake shewn in the transaction. But it was said, he admitted the oath of the party. This was, perhaps, the best evidence which could be got upon the occasion, to satisfy his judgment or conscience that he was right in his determination. And is not this admitted every day in the court of equity, and in cases in the summary jurisdiction of this court, in default of every other kind of testimony, and in small and mean causes before justices of the peace? And shall arbitrators be circumscribed within narrower limits than any of these tribunals on this point? The policy of arbitraments and awards is against such a rigid construction. Indeed, if such critical niceties were to be observed, it would entirely defeat the end and design of awards.

Mulder v. Cravat.

Upon the whole, to revert back to the general rule on this subject, no misbehaviour has been suggested, and no gross error has been pointed out in this umpirage; and these are the only legal grounds for setting it aside.

Mulder v. Cravat

It was therefore ordered, that the decision of the circuit court be set aside, and that the umpirage stand confirmed.

Present, GRIMKE, WATIES, BAY, JOHNSON, TREZEVANT and BREVARD.

Charleston District, 1802.

WILLIAM PAYNE, Endorsee of a Promissory Note, *against* JOSEPH WINN, Endorsor.

A formal protest by a notary is not necessary on an inland bill of exchange or promissory note, though reasonable notice is required, in order to charge an endorsor, that such note or bill has not been duly paid.

CASE on a promissory note against the endorsor. Verdict for plaintiff four hundred and sixty dollars. Motion for a new trial.

The defence in this case was, that after the note became payable at the *South Carolina* bank, it was not regularly protested agreeably to the rules of the bank, so as to enable the defendant as the endorsor, to go over against the drawer, *Thomas Cave*, for payment or security.

The case as reported, was briefly as follows: The defendant had endorsed the note in question, for the accommodation of *Thomas Cave*, which came into the hands of the plaintiff as endorsee, who lodged it in the *South Carolina* bank for collection. When it became due, the drawer, *Thomas Cave*, who had failed in the intermediate time, was unable to take it up, in consequence of which, it was lodged in the hands of *George Reid*, the notary of the bank, for the purpose of being protested, who proved, that after the note had been put into his hands to be protested, he called on the defendant and gave him verbal notice that the note was not paid at the bank when due, by *Cave* the drawer; but he did not formally enter up the protest at that time, under his notarial seal of office, as if it had been a foreign bill. The note in question, was due on the 6th, and payable on the 9th of *December*, 1799.

Payne v. Winn.

On the part of the defendant, it was proved that *Cave* had paid off several notes which fell due after the 9th of *December*, 1799, to wit, one endorsed by *Spencer Man* for five hundred dollars, in favour of *Joseph Peppin*, which fell due the 10th *December*, and was paid the 13th; and another endorsed by *Knipping and Steinmitz*, which fell due on the 15th of *December* following. And therefore it was contended, that if the note in question had been protested by the notary, or if *Cave* had been threatened to have the protest registered up in the bank, for the purpose of stopping his credit there, he would have found ways and means to have paid this note, as well as the two subsequent ones; or perhaps, in preference to the others; but as the plaintiff allowed him this indulgence, he ought to take the consequences of it. It was further proved to be the custom of the bank, not to register protests on *notes lodged for collection*, in which the bank was not interested, so as to affect the credit of the drawer at the bank, unless orders were given for that purpose by the holders of the notes; and that as no such orders were given in this case, it was urged that the holder, *Payne*, gave this further indulgence to *Cave* himself, in order to save his credit with the bank, and therefore should not now come over against the defendant as endorsor. That he had lost his money by want of due diligence.

The presiding Judge (TREZEVANT) charged the jury in favour of the plaintiff, who accordingly found a verdict for the amount of the note with interest. The present was therefore a motion for a new trial, on the ground of misdirection, &c.

After hearing arguments for and against this motion, the judges were unanimously of opinion, that the want of a formal protest by the notary in this case, was no bar to the plaintiff's recovery against the endorsor. A protest does not raise any new debt, or create any further responsibility on the parties to a bill or note; but only serves to give formal notice, that a bill or note is not duly accepted or paid.

M'Candlish v. Cruger.

country ought to govern this contract. *Burr.* 1077, 1078. It may well be compared to a note of hand, by which one man promises to pay another a sum of money, and if he fails to do it, he is only accountable for common interest. That as to damages, our act of assembly has made no provision for a man's drawing on himself. The provisions in the act, relate to third persons in whose favour a bill is drawn, or to whom it was negotiated. It allows ten *per cent.* damages (exclusive of interest) for the disappointment the drawee or endorsee sustains by the failure of payment. But no sort of provision is made for a case like the present one, so much out of the common line of business.

Turnbull, against the motion, in reply, admitted that if this had been a *Carolina* transaction originally, it should have been governed by the laws of *Carolina*; but as it was a foreign transaction in the island of *St. Croix*, it should be governed by the laws of that island. The debt was due there, and the money ought to have been paid there. But as the defendant had not money there, the plaintiff was prevailed upon to accept a draft on *South Carolina*, for the accommodation of the defendant. He therefore insisted, that under the peculiar circumstances of this case, the law of the country where this contract was made, and not where the money was to be paid, ought to be the rule by which it ought to be governed. He adverted to the case in 2 *Burr.* 1097. where Lord *Mansfield* admits, that there are many cases where the *law of the place of the transaction* should be the true rule; and so it ought in the present case under consideration. This, he said, was a mercantile question, and should be construed liberally in favour of the right of the plaintiff, who had indulged his debtor, by accepting a draft instead of insisting on his money at *St. Croix*. He said, the defendant would have been liable for the whole if he had been sued in *St. Croix*, the place where the contract was entered into; and if so, then on every principle of justice, he should be placed on the same footing as if the matter was to be determined at the place where the transaction took place, by the laws of the island.

The Judges after considering this case, observed, that there were some contracts, over which the *lex loci* where the contract was made should be the governing rule; and others again, where the laws of another country should decide the matter in question. That in all cases where the contract is to be performed in the country where it is made, the *lex loci* should be the rule of decision; but whenever the contract is made with a view of its being performed in another country, then the law of the place where the performance is to be made, should be the true rule.

Sir *John Bland's* case, referred to in 2 *Burr.* 10. 77. is strong in point. That there above principles are recognised by all the judges; that where a contract was made in *France*, to be performed in *England*, there the contract should be governed by the law of *England*. So in the present case, *Cruger* drew the bill in question in the island of *St. Croix* upon himself, payable in *Carolina;* the performance or payment was to be made here, and *Cruger* never could be called upon in any foreign country abroad, till there had been a default of payment here. All former contracts were done away by this new contract, and the court cannot take notice of any other, as no other is now before it.

Same point determined in the case of *Winthrop* v. *Pepoon* et al. *Bay's Rep.* vol. 1. p. 468. *Riley's* edit.

On the subject of interest and damages, the court was of opinion, that there was no law to warrant the jury in finding them; because, the contract being to be performed here, the laws of *Carolina* must regulate the transaction; and they are silent on the subject of damages, where a man draws upon himself; and with regard to interest, no more than seven *per cent.* can be recovered from the time of the demand. This contract, therefore, may well be assimilated (as was urged in the argument) to a note of hand to pay money on demand, and interest in case of non-payment is only recoverable from that day.

Rule for new trial made absolute.

All the Judges present.

Charleston District, 1802.

GEORGE WHITEFIELD *against* WILLIAM M'LEOD.

That a *sound price* warrants a *sound commodity* is a good general rule; but, where a buyer is informed fully of all the circumstances, and has a fair opportunity of informing himself of them, he shall be bound and held to his bargain, tho' it turn out to be a losing one.

Inadequacy of consideration where there is no fraud, &c. is not a sufficient ground for setting aside a contract.

MOTION for a new trial.

This was a special action on the case, to recover back thirteen hundred pounds sterling, for a ship which was stated to be unsound and not seaworthy. There was a written agreement in this case, by which the defendant agreed to sell, and the plaintiff to purchase, the ship in question, at and for the price of thirteen hundred pounds sterling, which sum was duly paid to the defendant agreeably to a bargain between them. Soon after the conclusion of this agreement, and the payment of the money, the plaintiff alleged that he had discovered that this was an old and unsound ship, not seaworthy, and that it would require more to repair her than she would be worth when repaired. Whereupon, he demanded a return of the money, and offered to rescind the agreement; but the defendant refused to give up his contract, and insisted upon holding the plaintiff to his bargain. Upon which he brought the present action, upon the implied warranty in law, that *a sound price deserves a sound commodity*.

Mr. *Parker*, for the plaintiff, contended, that this doctrine of recovering back money which had been paid by mistake, or where the consideration had failed, was so well established in our courts of justice at this day, that he would not dwell upon it, but would state it as a settled rule of law. He then offered to prove the payment of the money; it was, however, admitted. He then produced sundry estimates made by ship-carpenters and masters of vessels, by which he said it would appear, that it would cost more to repair this old ship, and make her fit for sea, than she would be worth when all these expenditures were laid out upon her. That, therefore, upon every principle of justice, the defendant ought to refund him the money he had paid him, with interets for the use of it.

The *Attorney-General*, in reply, stated, that this ship was not sold to the plaintiff as a new ship, but as one which had run some years, and performed many voyages; and consequently as a vessel which would stand in need of repairs. It was then proved, that the plaintiff was desired to go on board and examine her himself; that he did so, and took with him persons of skill and knowledge in naval affairs, particularly a captain *Hunter*, an experienced seaman and commander; and it was not till after a full examination of the state and condition of this ship that the bargain was closed. It was also proved by two merchants, Mr. *Adam Timmo* and Mr. *William M'Whann*, that if this ship had been new, she would have been worth two thousand five hundred guineas, more than double the sum she sold for.

The presiding judge left this cause to the jury, as matter very proper for their consideration, under all the circumstances, and they found a verdict for the defendant.

This was a motion for a new trial, on the ground that the verdict was against law, and the justice of the case.

Mr. *Parker*, in support of this motion, said, that as the doctrine he had contended for on the trial was now considered as the fixed and established law in this country, to wit, that a *sound price deserves a sound commodity*, he would go one step further, and lay it down as a principle equally sound, and as well deserving the support of this court, that a *fair price* raises an implied warranty of the *adequacy of consideration*; and for that purpose cited *Wooddeson*, 415. Men, he said, paid their money in order to get an equivalent; and if they were deceived, they ought at least to be restored to their former condition, even if no damages were allowed them, which was all that his client wished on the present occasion. And if the court would order a new trial, he had little doubt but that another jury would restore the money he had paid away, and place the parties where they originally stood before the bargain took place.

Whitefield v. M'Leod.

The *Attorney-General.* The plaintiff cannot possibly recover on any special warranty in this case; if he recovers at all, it must be on the implied warranty. He admitted that a sound price required a sound commodity, but denied that a sound price had been paid in the present case, in the sense in which the counsel for the plaintiff wished to place it. Only thirteen hundred pounds had been paid for this ship, and it was proved that if she had been new and sound, she would, from her size, capaciousness and construction, have been worth double the sum, which shews she was sold as a half-worn ship, and, consequently, only half the price of a new, sound ship was paid for her. That the doctrine urged on behalf of the plaintiff, that a fair price raises an implied warranty of the *adequacy of consideration*, was a novel doctrine, unknown to the common law, and had never been broached in any of our courts of justice before. Such a doctrine, he said, if once admitted in the formation of contracts, would leave no room for the exercise of judgment or discretion, but would destroy all free agency; every transaction between man and man must be weighed in the balance like the precious metals, and if found wanting in this adequacy, must be made good to the uttermost farthing; it never was, nor never could be, of practical use in society. The thing might at first sight appear to be plausible, but when brought to the test of experience, it would be found to go too far, to prove too much, and at last to destroy itself by the extravagance of its theory. The true rule respecting contracts he took to be this, that whenever a man paid a sound price to the seller for a commodity which turned out to be unsound afterwards, without the seller's knowledge of the unsoundness at the time of sale; or where there was a knowledge of the unsoundness, and a concealment on the part of the seller; in all these, and similar cases, a sound price raises an implied warranty to repay the money paid, and in all cases of fraud, the party was liable to smart money by way of damages besides. But in all other cases, where there is an equal knowledge of all the circumstances, and where each party has an opportunity of informing himself,

and the means of procuring information, and a man makes a contract or bargain with all such advantages before him, and with his eyes open, he ought to be bound by it; otherwise, good faith and mutual confidence would be at an end. In the present case, the ship sold to the defendant was sold as a half-worn ship. The plaintiff was desired to go on board and examine the vessel; he did so, and took trusty and confidential men with him for that purpose, and after all this examination made his bargain. Was there any thing like concealment of circumstances here; any knowledge of facts on one side, which was not freely communicated to the other? None. Was there any latent defects which the seller knew of, and the purchaser was not informed of? None. Every thing was open to him within the knowledge of the defendant, and he ultimately made the purchase upon the strength of his own judgment, and that of his friends; and not upon the recommendation or representation of the defendant. To suffer such a man to get rid of such a contract, under all these circumstances, would establish a principle which would undermine and blow up every contract, which could be made by any man, who wished to get rid of it afterwards. But the real truth of the case, he said, was this: The plaintiff had found out, that the bargain he had made was not likely to turn out to be an advantageous one, as freights which had been high, had fallen considerably; and therefore it was he wished to get rid of his bargain. He did not wish to be at the expense of repairing this ship, and putting her in a condition for sea, but thought it more advantageous, as things had turned out, to get back his money by rescinding this contract.

The Judges, after hearing the arguments, were all of opinion, there were no grounds for a new trial. The doctrine of a sound price deserving a sound commodity, they observed, though a very wise and salutary one, had been bandied about in our courts more than any other. It had vibrated from the extreme of rigour on one hand, to the ex-

Whitefield v M'Leod.

treme of laxity on the other; and juries had in too many instances in the exercise of these powers, rendered contracts too precarious. In this case, however, it appears, that the Judge who tried the cause, had left it to the sound discretion of the jury, who on their part again appear to have exercised it in a very proper manner, by holding the parties to their bargain. Many decisions have been made on this subject in our courts, and all on the same uniform principles of law and justice, though often misapplied. The general tenor of them all, when well understood, had been to guard against *fraud* and *circumvention*, and those *latent defects* which neither party knew of. But none of them ever meant, or were designed to aid men in getting rid of contracts fairly made, under a full knowledge of all the circumstances, relating to the subject matter of such contract on both sides. Every man was free to make a contract, and free to refuse it, but when once made, he was bound by it, where there was no fraud, concealment or latent defect. It was the sound policy of the law to support and uphold contracts, and not to destroy or render them uncertain. Inadequacy of consideration, is not alone any ground for setting aside a contract solemnly entered into. The adequacy or inadequacy of consideration, in every contract, depends so much upon the different ideas of men, in relation to the objects of their contracts, and the views and purposes with which they are entered into, that there is no fixing any general standard or rule by which it can be settled; for what one man might think a full and adequate consideration, another might think very inadequate, so that really it is so indefinite and uncertain in itself, that such a doctrine never could be reduced to practical use; as every contract might be impeached, where any advantage is gained on one side or the other, which had not equally been acquired by the opposite party.

Rule for new trial discharged.

All the Judges present.

THE STATE *against* JOHN JOHNSON, a Justice of the Peace for *Charleston* District.

Charleston District, 1802.

UPON an indictment for *oppression in office*, by committing one *Rachel Hart* to prison.

A magistrate is not liable to be punished upon an indictment, unless he acts corruptly or oppressively in his office. He may commit for contempts or abuse offered to his face, while in the execution of his office.

Upon this indictment, the defendant Mr. *Johnson* had been convicted. This was a motion for a new trial, on the ground that the conviction was not warranted in law.

This case was tried before GRIMKE, Justice, and the facts were briefly stated by him to be the following, to wit: That on the day stated in the indictment, the prosecutrix, who having a previous dispute with the magistrate, for committing her negro to gaol, went to his house, while he was in the execution of his office as a magistrate, and before sundry persons, insulted him to his face, as also the constable who had taken the negro to gaol. That he had desired her to go about her business, or be quiet, but she refused to do either, saying she had come to laugh at him; he threatened to commit her, but she defied his authority; upon which he sent her to prison, for her contemptuous behaviour; and for this commitment, she commenced this prosecution. On the trial before the jury, the judge told them, that the magistrate should have fined her in the first instance, under the act of assembly, (*Public Laws*, p. 129.) instead of sending her to prison, which he thought was premature on the part of the magistrate. The jury therefore brought in their verdict against him.

The counsel in support of this motion, argued, that this was an act of self-defence; and without the exertion of such an authority, the magistrate could neither defend himself against insult and abuse, nor execute the laws of his country committed to his care. That when the prosecutrix came to his house, he was in the actual exercise of his judicial functions; and she told him she had come to laugh at, or insult him; and when he threatened to commit her, she

The State v. Johnson.

defied his authority; he then sent her to prison; and he would have been unworthy of the office he bore if he had not done so. They then laid it down as law, that a justice of the peace, in all cases of contemptuous behaviour, has his choice of two remedies; either to proceed by indictment, or to make himself a judge in his own case, and commit for a contempt. 1 *Strange*, 420. *Salk.* 698. 3 *Mod.* 139. That a magistrate sitting in judgment on matters within his authority, constituted a court of inferior jurisdiction; and it was incident to all courts to commit for contempts. They further contended, that it was a well known rule of law, that unless a magistrate acts with a *corrupt intention*, he is not punishable by indictment. And so far does the law go on this head, that if a justice of the peace acts illegally, yet if he acts from good motives, and mistakes the law, the court will not grant an information against him.* 1 *Durnford & East*, 653.

But in the present instance, they denied that Mr. Justice *Johnson* had acted illegally; on the contrary, they insisted he had acted agreeably to the rules of law, and in support of decorum and good order, and had only used the peaceable weapons the law had put into the hands of every magistrate in the country in their own defence, and unless they were used by them whenever insult or abuse was offered to them, the magistracy and the majesty of the laws would be prostrated at the feet of turbulence and rude impertinence.

Against the motion, it was urged, that the liberty of a citizen had been infringed by this high-handed act of injustice. That the prosecutrix had been oppressed by this magistrate, under colour of his office. That the offence which she was supposed to have committed, was at most only a misdemeanor, which was in its nature bailable, and that the defendant ought to have demanded bail of her for her

* In *England*, the mode of proceeding against justices of the peace for mal-practices is by information, which in this country is taken away by our constitution. See *Mitchell's* case, *Bay's Reports*, vol. 1. p. 267. *Riley's* edit.

good behaviour, or have fined her in the first instance, and not have hurried her off to the common gaol of the district. That a jury of the country had duly considered all the circumstances of this case, and convicted the defendant, and their verdict ought to be supported.

The Judges, after duly considering this case, were clearly of opinion, that the magistrate had not exceeded his authority, or acted in any degree oppressively on the present occasion. If it had been an accidental thing, or if the words had been spoken in the sudden heat of passion, the justice in pity to her weakness might have overlooked it, or at most have fined her for her improper behaviour. But this appears to have been a deliberate act on her part; she went on purpose to insult him, and that, too, at a time when he was acting in his judicial capacity as a justice of the peace, before a number of citizens then on public business with him; he had therefore no other mode sufficiently speedy and effectual to check her insolence, but by commitment; as in all probability, she would have laughed to scorn and contempt at his fine, or demand of good behaviour; for she herself said, she went to laugh at him, and defied his power of commitment. The authority given by the act of assembly to fine for contempts, does not take away the common law remedy of commitment, for this is a power incident to every court of judicature, from the highest to the lowest, and without it good behaviour and order could not be preserved. A justice of the peace sitting in his judicial capacity, forms a court for the determination of all matters within his jurisdiction, and he is clothed by law with sufficient powers to defend his authority, if he chooses to exercise them, and he may make himself a judge in his own cause, and commit for contempts offered to his face, as is laid down in 1 *Strange*, 420. *Salk.* 698. and as was determined in the case of *Lining* v. *Bentham*, in this court, after solemn argument. See *ante*.

That it is the duty of this court, to support the magistrates of the country in the due execution of their duty, and

The State v. Johnson.

1 *Durnf. & East*, 653.

unless they act corruptly or oppressively, it never will punish them in a criminal way when they mean well, even if they should mistake the law upon small or immaterial points. In the present case, however, there does not appear to have been any mistake. The magistrate acted legally and properly in his own defence, and in support of his judicial authority.

Let the verdict be set aside, and a new trial granted.

Present, GRIMKE, WATIES, BAY, JOHNSON, TREZEVANT and BREVARD.

Gaillard and *M'Credie* for the motion, *Ward* and *Cheves*, against it.

Charleston District, 1802.

JOHN WILLIAMSON and CHRISTOPHER FITZSIMMONS *against* TUNNO & COX *et al.*

Breach of blockade under the treaty with *Great Britain*, must consist in *a second attempt to enter a blockaded port*, after being duly warned by the blockading squadron.

The loose declarations of a captain, at a time when not in possession of his own ship, that he intended to enter such port if released by an admiral commanding such squadron, are not *of themselves* a good ground for capture.

Ambiguity and uncertainty in the proceedings in a foreign court of admiralty, or where a decree is ounded on matter not put in issue by the pleadings, or where facts are stated in a decree or sentence which do not amount to a justifiable cause of condemnation; in all these cases, the cause is open to further evidence.

CASE on a policy of insurance. Verdict for plaintiffs. Motion for a new trial.

This was an action on a policy of insurance on the ship *John*, and cargo, from the port of *Charleston* to *Cadiz*, in which a verdict was for the plaintiffs. The present is a motion for a new trial on the part of the defendants.

The following is the brief state of the case, as reported by JOHNSON, J. who tried the cause.

That the vessel proceeded on her voyage till near the port of destination, when she was taken by one of the cruisers belonging to the *English* squadron then blockading that port. That the captain was taken on board of the ad-

miral's ship, who examined him and was about to discharge him, when he asked him where he intended to go if he should liberate his ship? Upon which the captain said, he would go *into Cadiz unless he got new orders*. Whereupon, the admiral ordered the ship to be carried to *Gibraltar*, as a prize to the fleet, for persisting in his intentions to enter into a blockaded port, where she was libelled and condemned. She was libelled as *enemies property, and condemned for persisting in an intention to enter into the port of Cadiz.*

Upon the trial, the Judge permitted the decree to be opened, upon the ground of this ambiguity in the pleadings, as it appeared she was libelled on one ground, and condemned on another, of a very different nature. After the decree was opened, and the parties permitted to go into proof, it appeared that the captain made no attempt to go into the port of *Cadiz*, after being taken on board of the admiral's ship. And further, that the property of the ship and cargo were *bona fide* the property of the plaintiffs, who were *American* citizens, and not belonging to the enemies of *Great Britain*. Upon this evidence, the jury, under the direction of the judge who presided, found for the plaintiffs.

In support of the motion for a new trial, on behalf of the underwriters, it was contended, that this decree was conclusive; and that the judge ought not to have permitted any evidence to be given to the jury, which went to contradict it. That the decree of the vice-admiralty court at *Gibraltar*, was clear and explicit; *the vessel was condemned for persisting in an intention to enter into the port of Cadiz, at that time a blockaded port;* which by the laws of nations was a good cause of condemnation. That the right of blockade in time of war, was a part of the national law; and a violation of it by a neutral in attempting to contravene it, was good cause of seizure and confiscation. *Vattel, lib.* 3. *sect.* 117. That a vessel may clear out to a port or place where it is lawful to trade, not knowing of a blockade,

Williamson & Fitzsimmons v. Tunno & Cox et al.

without being liable to capture; but persisting to enter after being warned, makes her liable; and this is expressly alleged in the condemnation, as the ground on which she was declared a lawful prize to the blockading squadron.

The counsel in support of the motion, then argued, that a condemnation or sentence in a foreign court, was conclusive against all the world, and that no evidence should be allowed to contradict it; otherwise, the right of captured property would be for ever fluctuating and uncertain. *Doug.* 554. *Park*, 356. 359.

For the plaintiffs, in reply, it was argued, that the judge was correct in his decision, that this decree should be opened, and that the parties should be permitted to go into evidence, to shew that this vessel and cargo was not subject to capture and condemnation. It was admitted, that in all cases where a ship and cargo is libelled and condemned generally as enemies property, that the decree is conclusive against all the world; or where she is libelled and condemned for breach of blockade, after being duly warned, it is equally conclusive. But on the other hand, it was urged, that wherever there was ambiguity, or doubts, or uncertainty in a decree, so that it was difficult to tell on what ground the property was condemned, the law would permit such decree to be opened, and suffer the parties to go into other evidence, which had been done on the present occasion. That the proceedings in every prize cause, are to be taken together, and not to be garbled or taken in detached parcels. In this case, it appears, from a perusal of the proceedings, that the vessel and cargo are libelled as *enemies property*, which is the point put in issue by the captors themselves; and they are condemned for a *breach of blockade;* a point not put in issue by the pleadings, but a very different one, and distinct in its nature.

Thus, there is a glaring inconsistency and repugnancy on the very face of these proceedings. Who can possibly tell from them, which is the true ground of forfeiture; the

cause mentioned in the libel, or in the decretal part of them? It is impossible. The law is therefore very clear, that if a decree is founded on matter not put in issue by the pleadings, such decree is not conclusive, but may be opened for further evidence. *Park*, 353. 356. Upon this ground, it was determined, after solemn argument in this court, in the case of *Blacklock & Bower* v. *Stewart et al.* that the circuit court was regular in opening a decree, and permitting the parties to go into evidence, on account of the ambiguity or uncertainty in the proceedings, and because the decree was founded on matter not put in issue by them. This point has therefore been settled in the above case, and in several others determined in the circuit courts in *Charleston* district, which have never been brought up by appeal to this court; the parties having acquiesced in the verdicts of the juries.

See *ante*, p. 363.

Park v. *Alexander*, *Blackwood* v. *Teasdale*.

On the other ground respecting the breach of blockade, it was very clear she ought not to have been condemned. The article in our treaty with *Great Britain* expressly declares, "That such vessels as might be bound to a port or "place blockaded, may be turned away from such port or "place, without being liable to seizure or confiscation, *un*-"*less after notice of such blockade the vessel should again at*-"*tempt to enter*." This article is founded in justice, as well as in the nature and reason of things, and is most certainly agreeable to the spirit of the law of nations. It guards against surprise, and is calculated to prevent an innocent neutral from being entrapped by trading to a place where it was previously lawful, not knowing of such blockade. By this article, notice of the blockade, and turning away, or in other words, an order to depart, must precede the attempt to enter a second time; and no vessel is liable to seizure unless she attempts again to enter a blockaded port, after being warned to depart. Now in the present case, there is no proof of any such attempt to enter after notice to depart; for the conversation between the admiral of the fleet and the captain, was on board of the admiral's ship, while the captain was not in his own vessel. And it appears, she was sent into *Gibraltar* only for words

Williamson & Fitzsimmons v. Tunno & Cox et al.

which passed in a conversation between them, in answer to a question put by the admiral, "*saying he would go into "Cadiz unless he got new orders;*" but there is no proof of his ever having attempted it, or having offered to go towards the port afterwards; so far from that, on the contrary, it does not appear that the captain ever got posssesion of his ship again, so as to have any power over her, as she was immediately ordered away to *Gibraltar*, and there condemned as a prize to the squadron. So that there was *no act done* by the captain of the ship, which could subject her to capture, either by the law of nations, or our treaty with *Great Britain.* And it is the first time in the history of nations, that ever a valuable ship and cargo were condemned, for *bare expressions* or *intentions*, which were never carried, or attempted to be carried into execution. They admitted, that if the captain had been suffered to have returned on board of his own ship, and attempted to have entered the port of *Cadiz* afterwards, the ship would have been a lawful prize. But the decree itself does not state that she attempted to enter the port after having been duly warned away; *only that the captain persisted in an intention to enter.* That a bare intention to do a thing, or persisting in such intention, without ever attempting to put it in execution, is a nugatory thing; even in treason, a bare intention without some overt act will not constitute the offence.

The Judges, after fully considering this case, were all of opinion, that the presiding judge on the trial, very properly opened the decree of the vice-admiralty court at *Gibraltar*, and permitted the parties to go into evidence, as the facts stated in the decree did not amount to a justifiable cause of condemnation; and also, because there was ambiguity and uncertainty in the proceedings, the libel stating, that the vessel and cargo were *enemies property*, and the decree condemning for *breach of blockade.* It was very clear therefore, for these reasons, that this decree was not conclusive, as was determined in the case of *Blacklock and Bower* v. *Stewart et al.* and in several other cases, and as laid down

in *Park*, 353. 356. And from the evidence offered in the case, it appears she was not liable to capture and condemnation, either on the ground mentioned in the libel, or in that of the decree.

With respect to the cause stated in the libel, to wit, that the ship and cargo were enemies' property, there was no proof even alleged that she belonged to the enemies of *Great Britain;* on the contrary, it was clearly proved that they were the *bona fide* property of the plaintiffs, citizens of *America*, so that on this ground there was not a shadow of reason for condemnation; indeed, the sentence for breach of blockade seems to admit the fact, by abandoning that ground, and condemning on another of a very different nature. And as to the breach of blockade, the reason assigned in the sentence of condemnation, that seems to be as groundless as the allegation in the libel; for, from the evidence offered on that head, she did not attempt to enter the port of *Cadiz* after being warned by the blockading squadron. The only evidence relating to that subject, was what passed between the captain and the admiral, on board of the flagship, when the former was under examination, while the captain was in the nature of a prisoner, and when he had no control or command over his own vessel; in answer to a question asked him by the admiral, where he intended to go if he released his vessel, he replied, *that he intended to enter Cadiz, unless he got contrary orders;* upon this the admiral ordered his ship to *Gibraltar*.

This verbal declaration of the captain to the admiral, in his then situation, was no ground certainly for seizing his ship. The treaty between *Great Britain* and this country is express on this point: "That an *American* vessel sailing "to a blockaded port, not knowing of the blockade, shall "not be detained, nor her cargo (if not contraband) be con- "fiscated, unless after notice she shall *again attempt to en-* "*ter*, but shall be permitted to go to any other place she "may think proper."

This is a fair exposition of the law of nations on the subject, as it prevents an innocent neutral from seizure and con-

Williamson & Fitzsimmons v. Tunno & Cox et al.

fiscation, who may approach a besieged place, not knowing of a blockade. The bare declaration of the master, unaccompanied with any fact corroborative of such his intention, was not a ground of seizure; besides, free agency was wanting in the case, to constitute the offence, for he was in the nature of a prisoner, not in the possession or command of his vessel, or having any control over her at the time when these expressions were uttered; and unless there had been a second attempt to enter into the port of *Cadiz*, there could be no offence against this treaty. But what is most remarkable in the case is, that the reason assigned in the sentence of condemnation is not an offence against the treaty. She is condemned *for persisting in an intention of entering*; this is no offence under the treaty; it is no cause of seizure; mere loose parlance, unconnected with any fact. It is evident, therefore, that she was not condemned for any cause justifiable in its nature, or by the law of nations, or by the treaty subsisting between the two nations If the condemnation had been for *attempting to enter, after being warned*, it might have been a good cause of capture; but persisting *in an intention* alone, is no cause of capture. Therefore the sentence, upon the face of it, if there were no other grounds in the case to open it, would have been sufficient.

New trial refused, and rule discharged.

Present, GRIMKE, BAY, JOHNSON, TREZEVANT and BREVARD.

DAVID SMITH *against* JOHN HART, Sheriff of *Charleston* District. *Charleston District*, 1802.

SPECIAL action on the case for an escape. Verdict for plaintiff. Motion for a new trial.

Upon an escape for negligence, if defendant is in on a *capias ad satisfaciendum*, the debt becomes the debt of the sheriff; but if in on mesne process, where the damages are unascertained, the jury may give what they think just and reasonable, although it be less than the demand, as in cases of insolvency, or the like, &c.

Insufficiency of the gaol not a sufficient excuse for a sheriff in an action for an escape.

This was a special action on the case against the sheriff for negligently suffering a defendant to escape from gaol, who was in upon mesne process, *per quod*, the plaintiff lost his debt, &c. in which there was a motion for a new trial, on the grounds of misdirection in the judge (TREZEVANT) who tried the cause, and also that the verdict was against law.

The original cause of this action was the value of a horse which *Smith* had sold to one *Currie*, for two hundred dollars. For this sum *Currie* was arrested and put in prison, but soon after broke gaol and escaped.

The present was an action against the sheriff of *Charleston* district, for negligence in permitting this man to escape out of custody. On the trial, the sheriff, by way of mitigation of damages, in case the jury should be induced to find against him, proved that this horse, which originally cost two hundred dollars, was soon after the purchase sold again as low as ninety dollars, which, it was alleged, was as much as he was worth; and, therefore, as *Currie* was in upon mesne process, and the damages had never been ascertained, the jury might, in their discretion, give what sum they thought reasonable and just, or what they thought *Currie* was able to pay; and that this was not like a case where a debtor is in gaol on a *capias ad satisfaciendum*, and escapes, where the sum becomes the debt of the sheriff, and he becomes liable *in numero* for the amount; here the jury had a right to judge of all the circumstances, and to give considerably less than the full amount. In short, it was alleged, that in a case of this kind, the jury might take all things under their consideration, and assess the damages against the sheriff in the same manner as between the original parties;

Smith v. Hart.

and, indeed, if it appeared that *Currie* was insolvent, so that the plaintiff could have recovered nothing from him, they might even find a verdict for the defendant.

The sheriff also offered to give evidence of the insufficiency of the gaol of the district, which he alleged was very insecure; that he had made many remonstrances to the governor against such insufficiency, and it had been frequently the subject of presentments from the grand juries of the district, but all to no purpose. But the presiding judge refused to admit this latter testimony, as to the insufficiency of the gaol, on the ground that if such excuse was permitted in law to exonerate a sheriff for an escape, there would be no such thing as responsibility in the sheriff's office: and the more so, because it was admitted that there was one secure room in the gaol, where he might have been confined. And as to the *quantum* of damages, the judge charged the jury, that it had not been proved in this case that *Currie*, the defendant in the action, had proved insolvent: the original debt sworn to and proved was, therefore, the true measure of damages; the ninety dollars, the sum the horse sold for after he was abused and worn down, ought not to be a rule in this case, though he admitted there were cases on mesne process where a jury might give less, if the circumstances of the case would warrant it, as in hard actions, or where the defendants were in insolvent circumstances, &c. The jury, however, gave a verdict for the full value of the horse.

The Judges, after hearing the arguments for and against this motion, were of opinion, that the presiding judge was correct in his opinion on both grounds, in his charge to the jury. That there is this distinction between a defendant in custody on a mesne process, and on a *capias ad satisfaciendum*; in the former case, where the damages are unascertained, the jury may take all the circumstances of the case into consideration, and give less than the sum demanded; but in the latter case, upon the *capias ad satisfaciendum*, the debt being ascertained on record, it becomes the debt of

Smith v. Hart.

the sheriff, and he is liable for the amount in case of an escape; although in the former case the jury may, if they please, give the whole demand.

Upon the ground of the insufficiency of the gaol, they were of opinion, that the testimony offered to be given to the jury, was very properly rejected by the judge; because, if testimony of this kind was once permitted in favour of a sheriff, it would be opening a door for sheriffs and their officers, and gaolers, for making excuses without end; for which reason the law is clear, that it is no legal excuse. 2 *Henry Blackstone's Reports*, 108. And what strengthens this doctrine on the present occasion, is, that there was one secure room, where the defendant in the original action might have been confined.

2 *Durnf & East*, 126. 3 *Comyns' Dig.* 589. 5 *Durnf. & East*, 57.

Rule for new trial discharged.

Present, GRIMKE, BAY, JOHNSON, TREZEVANT and BREVARD.

JOHN JONAH MURRELL *against* WILLIAM MATHEWS.

Charleston District, 1802.

DEBT on bond, given in part payment for the consideration money of a tract of land in *Georgetown* district.

In this case, the defendant, who had purchased the land in question, and had given his bond for the purchase-money, being apprehensive that the plaintiff's title might not prove to be a good one, refused to pay the money until he had the opinion of the court upon the subject.

The point therefore came before the court upon a special verdict, found in the district court at *Georgetown*, which stated, "That *Robert Murrell*, the father of the plaintiff, "by his last will and testament, legally executed, and bear- "ing date the 10th of *March*, 1789, did *inter alia*, give and "devise unto his son *John Jonah Murrell*, the present "plaintiff, all his lands wheresoever they might be, to him,

Where a father gives land to his son and the heirs of his body, which would create an estate tail in *England*; the marriage of such son, and having issue, will create a conditional fee in *South Carolina*; and his alienation afterwards during the life of such issue, will give a fee simple estate to a purchaser, and bar the remainder-man.

Murrell v. Mathews.

" and the lawful heirs of his body; but in case he, or the " lawful heirs of his body, should die without a lawful heir, " then and in that case, he devised the said plantation or " tract of land, containing 1,240 acres more or less, where " his son *Jonah* then resided, called *Tiberin*, to his grand- " son *Robert Huggins*, to him and the lawful heirs of his " body for ever."

The jury further found, " that the testator died after " making this will, and that his son, *John Jonah Murrell*, " took the above plantation under and by virtue of the " above devise. That the said *John Jonah Murrell* was " lawfully married, and had issue born alive, and during " the life-time of such issue, to wit, on the 9th of *August*, " 1794, the said *John Jonah Murrell*, did absolutely sell " and convey the above plantation in fee-simple, to the de- " fendant *William Mathews*; in part payment whereof, the " within bond was given. If under these circumstances, " the said *John Jonah Murrell*, the plaintiff, had a right " vested in him by the aforesaid devise, to the aforesaid " plantation, and a right to sell and convey the same as he " has done, then and in that case the jury find for the plain- " tiff; but if he had no right to sell and convey the same, " then they find for the defendant."

Co. Litt. 19. a. *Plow.* 246. b. 7 *Co.* 34. 1 *Roll. Abr.* 840, 841. 2 *Inst.* 333.

In this case, the Judges were all clearly of opinion, that the marriage of *John Jonah Murrell*, and birth of a child, gave him a conditional estate in fee in the land in question at the common law. And his having conveyed the same away during the life of such child, barred the remainder-man, and all claiming under him; and consequently, vested a good estate in fee in *Mathews* the defendant.

Judgment for the plaintiff.

All the Judges present.

N. B. The statute 13 *Edward* I. creating perpetuities by estates tail is not in force in this country, consequently what would make an estate tail in *England*, is a *conditional fee* in *South Carolina*, which is alienable on the donee's having lawful issue.

Executors of JOHN VANDERHORST *against* JOSEPH WHITNER.

Columbia, 1802.

TRESPASS, to try a title to a tract of land in *Pendleton* district.

Executors not liable for costs on a nonsuit, though they may be liable on a *non prosequitur*, where delay or *laches* is imputable to them, but in no other case. They may even discontinue without costs, if they discover that they cannot maintain their suit after it is commenced.

The plaintiffs in this action were nonsuited for the want of the original will of the deceased *John Vanderhorst*. Upon the trial, the plaintiffs produced a certified copy from the office, which they thought would have been sufficient; but the defendant insisted on the production of the original, which the plaintiffs had not to produce; whereupon they were nonsuited. Upon the renewal of the action, a rule was obtained by the defendant against the plaintiffs, to shew cause, why the proceedings should not be stayed until the costs of the former suit were paid, before they proceeded on to a second trial. But the presiding Judge (JOHNSON) discharged the rule, on the ground that executors were not liable to pay costs of a nonsuit, in a case like the present, where there had been no *laches* on the part of the executors. This was therefore an appeal from the decision of the district court.

Mr. *Nott* now moved, that the decision below be set aside as against law, and for that purpose relied on the case of *Hawes* v. *Sanders*, 3 *Burr.* 1584. where it was determined, that an executor should pay costs of a *non prosequitur*, for not declaring in time. Also, *Durnford & East*, 654. to same point.

Vanderhorst v. Whitner.

The counsel against the motion, Messrs. *Bowie* and *Taylor*, relied on *Bennet and Croker's* case, 4 *Burr.* 1927. also, on 2 *Strange*, 654. where it was determined, that an executor shall not be liable for costs, in cases where he has not been guilty of any *laches*, or unnecessary delay.

The Judges were unanimously of opinion, that the decision of the presiding Judge was legal and proper. There did not appear to be any *laches* or neglect in the present case. The executors were pursuing their ordinary and regular remedy for recovering the rights of their testator, and they did not know that the defendant would have called for the original will upon the trial, after so many cases had been determined on giving official copies of such wills in evidence; and the nonsuit was ordered not on account of any neglect or delay on the part of the executors, but because they did not produce on the trial the highest evidence the case was capable of. Under these circumstances, the law does not make executors liable for costs upon a nonsuit, on account of defect of evidence on the trial.

The reason assigned in the case of *Hawes* v. *Sanders*, 3 *Burr.* 1584. was because the plaintiff had not proceeded to trial agreeably to notice. In that case, it was the executrix's own fault, in harassing the defendant, in giving him notice of trial, and obliging him to come prepared with his witnesses. An executor in such case is liable for costs; for an executor is only entitled to privilege in a case where the fault was not his own. So in the case in *Salk.* 314. he was held liable for not going to trial according to notice, though it is there said, he shall not pay costs on a nonsuit. *Barnes's Notes*, 107. to the same point. All the above cases go upon the idea of *laches* and delay on the part of executors, and therefore they were held liable, but in no other instances are they liable; and it is expressly laid down in 5 *Cro. Jac.* 229. that an executor does not pay costs upon a nonsuit; an executor, if he discovers that he cannot maintain his suit, may even discontinue without costs, 2 *Strange*, 871. From all these cases, then, the true rule

3 *Burr.* 1586.
4 *Burr.* 1928.

seems to be, that wherever there has been any delay or improper neglect, he shall pay costs; but where he has not been guilty of any such conduct, he is privileged from costs. Vanderhorst v. Whitner.

Let the rule for reversing the decision of the circuit court below be discharged, and the determination stand confirmed.

Present, GRIMKE, WATIES, BAY, JOHNSON and BREVARD.

WILLIAM M'CORMICK *against* JOHN CONNOLY.

Charleston District, 1802.

ASSUMPSIT for work and labour in building a house on *Sullivan's* island. Verdict for the plaintiff. Motion for a new trial.

Where a contract is made for building a house, and additions or alterations are made in the plan, &c. the original contract shall remain, and not be set afloat for that reason.

Tradesmen and contractors, making out bills for materials and workmanship regardless of their contract, not to be allowed. The original contract in all such cases, shall be the basis of the charge, and all additions, &c. shall form extra charges.

The plaintiff in this case, offered in evidence a bill of materials, and also another for the workmanship in building the house, together with a measurement and valuation by three carpenters, in which they gave it as their opinion, that the plaintiff was well entitled to the sum of three hundred and ten pounds sterling, for his materials and workmanship, &c. but the defendant had no notice when they were to meet to make this valuation, nor was he present when it was made.

On the part of the defendant, it was proved, that there was a contract or special agreement made for the erection of this building between the parties, and that the plaintiff had contracted to build a house of the same size and dimensions as that of *I. H. Stevens*, a neighbour on the island, at and for the price or sum of one hundred and fifty pounds sterling; and that in pursuance of this agreement, the plaintiff

M'Cormick v. Connoly.

proceeded to measure Mr. *Stevens's* house, and soon after went to work. That there was no difference in the plan or dimensions of the two houses, except that instead of the roof springing or rising from the side of the house, the piazza and body of the building were covered by the same roof. The defendant on his part, admitted, that there were four dormant windows in the house which were not in Mr. *Stevens's* house, which he was willing to pay for at a just valuation.

On behalf of the plaintiff, it was argued, that whenever an agreement or contract is entered into for building a house, and there is a variation in the plan or additions made which were not in the original agreement, then in every such case, the contract is set afloat or rescinded; because, it is no longer the one originally made, but a new one; in which the builder has a right to charge for his materials and labour at the usual and accustomed prices, unless a specific price is agreed upon in the last contract; and that this had been the custom of master builders in *Charleston* for many years past.

For the defendant, in reply, it was admitted, that of late years, there had been instances in *Charleston*, of contracts having been eluded and set afloat for trifling or inconsiderable alterations in the plans of the buildings, but that it was an erroneous principle, subversive of justice, and a most unwarrantable exaction on the part of builders, who had always confederated together to support one another in those exorbitant charges and demands. That the community had often groaned under these exactions on the part of tradesmen, and that it was now high time to make a stand against them, and put the principles upon which these unreasonable demands were founded, to the test of law and substantial justice. In the present case, the original contract was for one hundred and fifty pounds sterling, with which the plaintiff had agreed to be perfectly contented; but owing to the trifling alterations, which would not have

made the difference of fifty dollars, according to the best calculations, he had gone off from the first contract and had trumped up an account for materials and labour, &c. to the enormous sum of three hundred and ten pounds sterling, which had been vouched by other respectable tradesmen. This, it was said, was such an imposition, as could not be tolerated or supported in a court of justice. It was admitted by the counsel for defendant, that every contract ought to be upheld and maintained with good faith, and that whenever there were additions or alterations made in a building contracted for, that such additions and alterations ought to be paid for at a reasonable valuation; but, that every other part of the contract should remain unaltered by it. This construction would go to support and maintain contracts, and at the same time do justice to tradesmen for all extra work done: whereas, the construction contended for by the plaintiff, went to destroy contracts, and render them uncertain, and to lay the foundation for those unwarrantable exactions which this city had so long laboured under, contrary to every principle of reason and justice.

The presiding Judge, (GRIMKE,) in his charge to the jury, mentioned, that however this practice of setting aside original contracts for buildings, on account of additions and alterations had got into common use in this city, and into use throughout the country in general, it was neither founded in law nor justice. That on the contrary, the wisdom and policy of the law was to uphold and maintain contracts where they were fairly entered into; and that in all cases, where there were alterations and additions made in buildings, such should be paid for, without altering or affecting in the least the original contract.

The jury, however, contrary to the charge of the judge, found a verdict for the plaintiff to the whole amount of his demand, agreeably to the valuation of the carpenters who valued the work.

M'Cormick v. Connoly.

This was therefore a motion for a new trial, on the ground of the verdict being against law, and the opinion and direction of the judge who tried the cause.

The same grounds which had been taken by the counsel on the trial of this cause, were again urged for and against this motion for a new trial; only, that it was strongly urged, on the part of the defendant, that it was high time the law on this point was finally settled, as this was a never failing source of litigation in the community.

The Judges, after considering this case fully, and hearing the arguments, were all of opinion, that the law as laid down by the presiding Judge to the jury in this case, ought to be supported and maintained in the construction of contracts. That whatever the practice might hitherto have been among the master builders in *Charleston*, in making out bills for materials and labour, in cases where there were additions or alterations in buildings contracted for, without any regard to such contracts, it was erroneous in principle and illegal. Wherever a contract is made for any building of any size or dimensions, it becomes a law to the parties, and they are both bound by it; and wherever additions or alterations are made in such buildings, they become a new or additional contract, either express or implied, without affecting the original contract, and must be paid for agreeably to such new contract if a sum is fixed for that purpose, but if not, then according to a just and reasonable valuation.

It is a just maxim, that in the construction of covenants and agreements, such a one should always be given as would uphold and maintain good faith between man and man, rather than to defeat the intentions of the parties to the covenant; to give the construction, therefore, urged by the plaintiff's counsel in this case, would, in opposition to this maxim go to defeat entirely the original contract between the parties; but on the contrary, the other construction will support and maintain both the contracts between the parties. The amount of the first contract, should form in every case

of this kind the basis of the charge, and the extra work should constitute the additional charges which were not included in the first contract. In *Peake's Nisi Prius*, 103. the same principles are laid down as recognised in the *English* courts, and the rule is worthy of adoption in this country as being founded on reason and justice.

Let the verdict be set aside, and the rule for a new trial be made absolute.

All the Judges present.

Ward, for plaintiff, *M'Credie*, for defendant.

JOHN REIGNE *against* WILLIAM DEWEES.

Charleston District, 1802.

MOTION for new trial.

In this case, the plaintiff had obtained an interlocutory order for judgment, and gave out his case to the jury on a writ of inquiry, who found a verdict for the defendant.

Where judgment goes against a defendant by default, the jury on executing a writ of inquiry are bound to give some damages, if ever so small; they cannot find for a defendant in such a case.

This was a motion to set aside the verdict and to have a new trial, on the ground that the jury were bound to give damages, however small they might be; as the defendant's suffering the judgment to go against him by default, was an admission in law, that *something was due;* but the *quantum* was for the jury to determine. In support of this doctrine, Mr. *Bayley* quoted 3 *Black. Com.* 91. 397, 398. and *Impey's Practice*, 399.

Per Curiam. The defendant's not pleading to an action, but suffering judgment to go against him by default, is a *tacit* admission in law that something is due; and the jury

Reigne v. Dewees.

are bound to give some damages if ever so small, even one cent, as laid down in 3 *Black.* 398. 1 *Har. K. B.* 190. 2 *Str.* 1259.

Verdict set aside, with permission to plaintiff to send his cause to another jury.

Present, GRIMKE, JOHNSON and TREZEVANT.

Charleston District, 1802.

WILLIAM HASELL GIBBES *against* JOHN MITCHELL.

Privilege of one of the debtor's in a joint and several bond on account of his being a member of the legislature, shall not protect the other co-obligor on a separate action against him on the same bond.

DEBT on bond. Verdict for plaintiff. Motion for a new trial.

The bond on which this action was brought, was a joint and several bond, given by the defendant and his brother *William B. Mitchell.* The latter was a member of the legislature, and the suit was commenced at a time when he was privileged from arrests, on account of his being a member of the legislative body; he pleaded his privilege and it was allowed him; upon which his brother, the present defendant, claimed a similar privilege, on the ground that he was only security to the bond, and that the privilege extended to him as well as the principal; and that the privilege of the other co-obligor, would be illusory if it was not extended to him also; but the presiding Judge (WATIES) refused to allow the privilege to him, which had been extended to his brother the member of the legislature, or to postpone the trial, as the bond was joint and several, and the law did not know the defendant as security but as one of the principal debtors. The case then went to the jury, who found a verdict for the plaintiff against him.

This was therefore a motion for a new trial, as it was alleged the judge had mistaken the law, in not allowing

the defendant the same privilege which had been allowed the other co-obligor.

Gibbes v. Mitchell.

But the other judges, after hearing argument, unanimously confirmed the decision of the judge in the circuit court below; because, on every joint and several bond, where the actions are separated against two or more defendants, every individual is liable in his separate and distinct capacity; and the privilege or exemption from arrest, which the law allows to one of the defendants, will not prevent the ordinary course of justice, against any of the other co-obligors. This privilege is not to be extended by implication, because a fellow debtor is entitled to legislative exemption from arrests.

New trial refused.

Present, GRIMKE, JOHNSON, TREZEVANT and BREVARD.

JAMES CHARLES and THOMAS FRASER *ads.* PATRICK M'LEOD.

Charleston District, 1802.

MOTION to reverse a decision made by a judge at chambers.

All motions for leave to plead double, must be made in the circuit courts, *sedente curia*, and not before a judge at chambers; or before the constitutional court of appeals, which has only an appellate jurisdiction.

A motion was made at chambers, before Mr. Justice TREZEVANT, for leave to plead double, and an order was signed by him for that purpose, as one of course; and this was a motion to reverse it.

After due consideration, the Judges were of opinion, that this was not one of those kind of motions which came regularly before a single judge at chambers, but should be

Charles and Fraser ads. M'Leod.

granted by the court, where the proceedings are filed and on record, *sedente curia*.

The defendants then moved for leave to plead double, but this motion was refused, on the ground that this court had no original jurisdiction, only an appellate one; consequently, the defendants must make their motion for this order in the circuit court below.

Present, GRIMKE, JOHNSON, TREZEVANT and BREVARD.

Charleston District, 1802.

JOHN HART, Sheriff of *Charleston* District, *against* ISAAC TOBIAS.

In the action of debt on a replevin bond, the measure of damages must depend on the value of the goods, where the rent is more than they were worth. But if the value of the goods be more than the rent in arrear, then the rent due is the true measure of damages in such case; no interest is recoverable in either case, as the condition of the bond is only to return the goods.

DEBT on a replevin bond. Verdict for plaintiff. Motion for a new trial.

As this was a bond for the performance of covenants, the only point for the jury was the *quantum* of damages.

The plaintiff proved the amount of rent in arrear, which was due by the tenant, and contended that the jury were bound to give that amount in damages against the defendant on this bond; as the tenant had eloigned, or carried off the goods seized and distrained for rent, together with interest from the day it was due.

The defendant, on the other hand, alleged, that as he was only security on this bond, for the forthcoming of the goods levied on by the distress warrant, and which were replevied by the tenant, that their value only was the true measure of damages, and that the jury could give no more.

Hart v. Tobias.

The presiding Judge (BAY) told the jury, as the law did not appear to be clearly settled on this point, that the best general rule in his opinion, would be for the jury to give the amount of the rent in arrear; as the act of replevying the goods seized, interposed between the landlord and his right to the goods, and prevented his common law remedy by distress; and as the delay was occasioned by the act of the tenant, he ought in justice to pay interest. The jury found accordingly the amount of rent in arrear and interest.

This was a motion for a new trial, on the ground of misdirection in the judge, and as a verdict against law.

Mr. *Cheves*, in support of this motion, quoted *Espinasse's Dig.* 348. where it is said, that the sum to be recovered should only be the value of the goods distrained; also, 4 *Durnford & East*, 483. to the same point. He observed, that in 1 *Henry Blackstone's Rep.* 36. the law had been laid down to the contrary; but in 2 *Henry Blackstone's Rep.* 50. the law in vol. 1. p. 36. had been overruled, and the law in *Espinasse* confirmed.

Mr. *Ford*, for the plaintiff, insisted, that the rent in arrear was the true measure of damages, and for that purpose quoted 6 *Bacon's Abr.* (new edit.) 84. and said the case in 2 *Henry Blackstone*, was a case against the sheriff, and therefore it was that the value of the goods was determined to be the true measure of damages, as he could not be answerable for more than their value.

The Judges after due consideration, were of opinion, that every case of this kind must depend upon its own circumstances, which probably had occasioned the contradictory decisions mentioned in the books on this subject. They took the true rule to be this, that if the rent due be more than the value of the goods distrained, then the value of the goods should be the true measure of damages. But if the value of the goods be more than the rent in arrear, then the

Hart v. Tobias.

rent due should be the true measure. By this rule, all the parties would have substantial justice done them. If the goods were fully sufficient to pay off the rent, the landlord would gain the full benefit of his remedy; but if, on the contrary, the goods were not sufficient, the security to the replevin bond would not be entrapped, or obliged to pay more than the real value of the goods he was bound to see returned. But that no interest was recoverable in either case, as the condition of the bond is only to return or redeliver the goods, *or pay the value*. That at all events, a new trial must be granted, that the law may be settled on this subject.

Rule for new trial made absolute.

Present, GRIMKE, BAY, JOHNSON, TREZEVANT and BREVARD.

Charleston District, 1802.

JOHN WILLIAMSON Endorsee of Promissory note *against* WILLIAM TURNER, Endorsor.

A notary public making out a protest from the information of a clerk, is not a sufficient ground for his entering it up in due form; it should be founded on his own personal knowledge, he must not depend on hearsay. Though the clerk himself would be a competent witness to prove due diligence, in attempting to give due notice of non-payment by a drawer.

CASE against the endorsor on a promissory note of hand. Verdict for plaintiff. Motion for a new trial.

The defence set up in this case, was want of due notice of non-payment by the drawer, and although the protest appeared to be in due and proper form to prove due and legal notice, yet upon the examination of the notary himself, it appeared that he had sent his clerk to the house of the defendant, who returned and told him he was out of town; upon which information he entered up the protest. The presiding Judge (GRIMKE) charged the jury, that this was

not that regular kind of information, which would justify the notary in entering up the protest, in order to charge an endorsor. But the jury, contrary to the opinion of the judge, found a verdict against the defendant for the amount of the note and interest.

Mr. *Cheves* moved for a new trial, on the ground that the verdict was against law, and the opinion of the presiding judge on the trial.

Whereupon, all the Judges concurred in opinion, that the verdict should be set aside and a new trial granted; because, the law of merchants gives very high faith and credit to those kinds of instruments being made by a sworn officer; so much so, that they are scarcely ever called in question in a court of justice; but are received as *prima facie* evidence in all mercantile questions of this kind. But where it appears that a notary does not depend upon his own knowledge, as to so important and leading a fact as that of an endorsor or acceptor of a bill of exchange or promissory note, *not being to be found upon the necessary inquiry*, it is a good ground to reject that instrument, as this kind of hearsay information from a clerk, will not warrant by any means so confidential an officer as a public notary, in entering up his protest. His own knowledge of the fact, will alone justify him in making up his protest, either to send abroad into foreign countries, or in inland transactions. The Judges, however, were of opinion, that the clerk himself would have been a competent witness to have proved the use of due diligence to find out the defendant, in order to give him notice of non-payment by the drawer, independent of the protest.

Rule for new trial made absolute.

Present, GRIMKE, JOHNSON, TREZEVANT and BREVARD.

Charleston District, 1802.

HARRISON & Co. *against* WILLIAM M'KINNEY.

A bare acknowledgment of the justice of a debt by a defendant where no sum is mentioned, is not sufficient to warrant a jury to found a verdict upon. There must be a sum certain mentioned, or some document shewn to him, by which it may be rendered certain, before a jury can give any specific sum.

CASE for money had and received. Verdict for plaintiffs. Motion for a new trial.

In support of this action, a witness, *John Calhoun*, was produced, who swore he went with the sheriff's deputy to point out the defendant, who said it was a just debt, and he would pay it before he left town; but the witness did not know the amount of the debt, nor the precise sum sworn to. There was an affidavit of the debt annexed to the writ, but it appeared it was appended to it after this acknowledgment of the defendant.

For the plaintiffs it was alleged, that the debt was substantially proved by *Calhoun*, the witness, and the exact sum could be rendered certain by reference to the writ and the affidavit annexed to it.

For the defendant it was argued, that as no precise sum was mentioned by him when this acknowledgment was made, the jury had no rule to go by; no definite sum was proved; consequently, there was a total failure of testimony or proof, so as to enable them to find any specific sum, or the *quantum* of the plaintiff's demand. That the sum could not be rendered certain by reference, because it appeared from the inspection of the writ and affidavit, that the latter was annexed after the writ was served; and as it was not before the defendant when he made the acknowledgment, he could not possibly have made any reference to it.

The presiding Judge (GRIMKE) left the case to the jury, to determine whether the defendant referred to the sum mentioned in the affidavit, or not; and if they should be of opinion he did, then they ought to find for the plaintiffs; but if not, then for the defendant.

The jury, however, found for the plaintiffs the amount of the debt mentioned in the affidavit.

Mr. *Cheves* now moved for a new trial, on the ground that the verdict was against law, inasmuch as there was no evidence to warrant it. The action was for money had and received, and the only evidence was, that defendant said *it was a just debt*; but what that debt was, or to what amount, there was not one tittle of evidence, nor any document by which it could be rendered certain by reference, at the time when this acknowledgment was made by the defendant.

The Judges were unanimously of opinion, that the proof in this case, was too vague and indefinite for the jury to found any verdict upon; it was clearly a finding without evidence, for none appears to have been offered of the sum due at the time of acknowledgment; nor was there any document mentioned, to which, by reference, the amount could be rendered certain. It is said, there was an affidavit annexed to the writ, which mentions the exact sum due; but it also appears, that this affidavit was annexed to the writ after the service and after the acknowledgment made by the defendant, so that it formed no part of the proceedings in the cause at that time; and therefore it could not be referred to, as the defendant was totally ignorant of it.

Besides, there is something mysterious in this affidavit being annexed after the service of the writ; for it is well known to be the practice, to endorse affidavits of the subsisting debt on, or to annex them to, the original writ before service, as a rule to the sheriff in taking bail, but never afterwards; to say no more of it, it was a very irregular mode of proceeding.

Rule for new trial made absolute.

Present, GRIMKE, JOHNSON, TREZEVANT and BREVARD.

M'Credie, for plaintiff, *Cheves*, for defendant.

Charleston District, 1802.

ANN KENNEDY *against* O'BRIEN SMITH.

Plaintiff may file a declaration at any time within a year and a day after the return of the writ but not afterwards, as the writ at the expiration of that time becomes discontinued; altho' by the rules of court, if the plaintiff does not file his declaration during the second term, the defendant may sign judgment of *non prosequitur* against him.

MOTION to reverse a decision in the circuit court.

Mr. *Simons* stated, that in *March*, 1793, the writ in this case had been issued, served and duly returned, but for various reasons, the plaintiff was not prepared to file her declaration till *May* term, 1802; and that he had given the defendant's attorney one term's notice, agreeably to the rule of court; and therefore had moved the circuit court of *Charleston* district, the beginning of the last term, for leave to file his declaration. But the presiding Judge (JOHNSON) ruled that the writ had abated, as no proceedings had been carried on within a year and a day after the return; and being out of court, there was no ground for subsequent proceedings. This was a motion to reverse that decision, and for leave to go on in the court below and file his declaration.

Mr. *Simons*, in support of his motion, contended, that after a suit is once well brought, it can never go out of court without some judgment of the court, either by *non pros*, nonsuit, verdict or otherwise. That if a second writ had been issued, and the defendant had pleaded the first writ in abatement, he would thereby have destroyed the second writ. 1 *Bacon's Abr.* 22. That it is laid down in 1 *Cromp.* 212. that where four terms elapse, defendant must have a term's notice, which had been given in this case conformable to the tenth rule of court.

See the case of *Stevens* v. *Thayer*, *ante*.

Mr. *M'Credie*, contra, said there had been a very uncommon delay in this case; not only a year and a day, but seven years had elapsed between the issuing the writ and the motion for leave to file the declaration, without any continuance, motion or other proceeding whatever, to keep the action in court. That it is a well known rule at common law, that if the plaintiff does not proceed to file his declara-

tion within a year and a day after the return of the writ, it abates and the party is then out of court, and the defendant goes without day. Even a solemn judgment entered up on record, is supposed to be satisfied if there are no proceedings within a year and a day; and the plaintiff is obliged to begin *de novo* by writ of *scire facias;* which in many respects may be considered as a new suit, as the defendant may plead to it. But in the present instance, there has been a chasm of seven years, without taking any step to fill it up, which to all intents and purposes, operates as a discontinuance; for it is laid down in 3 *Blackstone's Commentaries*, p. 296. that when a plaintiff leaves a chasm in the proceedings of his cause, "as by not continuing of it regularly from "day to day, or from time to time, as he ought to do, the "suit is discontinued, and the defendant is no longer bound "to attend to it; but the plaintiff must begin again by suing "out a new original." In 1 *Viner*, 63. it is laid down, that every discontinuance abates an original. So in 3 *Blackstone's Commentaries*, 316. plaintiff becomes nonsuited if he omit to file his declaration, or continue, and defendant goes without day.

By the Judges unanimously. Let the rule for reversing the decision of the circuit court be discharged, and the adjudication stand confirmed.

For by the general rules of law, and the practice of the courts both in *Great Britain* and in this country, a plaintiff is bound to declare within a year and a day after the return of the writ; but by a rule of our court, if he does not declare within the second term, the defendant may obtain a rule to compel him, or sign judgment of *non pros;* though if the defendant does not choose to take advantage of the plaintiff's neglect, the plaintiff may still file his declaration within twelve months. There is, however, no authority or case in the books, which will warrant him in filing it after the year and the day. The case cited from *Crompton*, was a cause at issue, and the plaintiff had not proceeded to trial. There it is laid down, that a term's notice was necessary;

Kennedy v. Smith.

but still it was given within the year. All the cases quoted from 3 *Black. Com.* are strong in point, and prove that leaving a chasm in the proceedings, without regular continuances from time to time, will amount to discontinuance. But the lapse of seven years, is so great a *laches* on the part of the plaintiff in this action, that nothing on her part can cure it.

Present, GRIMKE, TREZEVANT and BREVARD. WATIES and BAY afterwards accorded with the other Judges in this adjudication.

Columbia, 1802.

CHANELLOR *against* VAUGHN.

In cases of violent and unprovoked assaults, the court will not grant a new trial on account of high damages, but let violent and turbulent characters take the consequences of their own rude and offensive behaviour.

ASSAULT and battery from *Sumter* district. Verdict for plaintiff. Motion for a new trial.

This appeared from the report of the judge who tried the cause, to have been a very violent and outrageous assault, and without provocation on the part of the plaintiff, in which the jury gave heavy damages, to wit, —— dollars; and the present was a motion for a new trial, on the ground of excessive damages.

But the Judges unanimously refused it, on the ground that wherever an assault was wantonly committed upon the person of a peaceable citizen, without provocation, as appeared from the report of the judge who tried the cause, it was a very proper case for the consideration of the jury, as it went home to the feelings of every orderly, sober-minded man in the community. It was their province to weigh well and consider all the circumstances of the case, and to assess such damages as they thought would be commensurate with the nature of the injury, and such as would effectually check such an evil. In the present case, however, they did not think the damages excessive. Let the defendant

take the consequences of his violent and outrageous conduct; he is entitled to no indulgence from this court, nor will it ever interfere in such cases, unless the damages are unreasonable beyond measure. The peace and good order of the community depended very much on making proper examples of such disorderly and turbulent men as the defendant appeared to be.

Chancellor v. Vaughn.

Rule for new trial discharged.

All the Judges present.

DOUGLASS *against* FRIZZLE.

Columbia, 1802.

MOTION to set aside a nonsuit.

Upon the call of the docket at the circuit court at *Lancaster* district, the plaintiff was not ready with his witnesses to go to trial, whereupon he was nonsuited. The day following the order for nonsuit, the plaintiff moved to have his cause reinstated on the docket for trial at the next court, upon sundry affidavits, stating that the plaintiff himself was accidentally prevented from going to court in time to support his cause, on the call of the docket, and that several of his witnesses who had promised to attend did not, owing, as he conceived, to a heavy fall of rain, which had raised several of the water-courses so as to make them impassable; but the court below did not think these sufficient reasons, especially as many causes had been very frequently put off, under very frivolous pretences.

Where a plaintiff is prevented by accident from attending to support his cause on the call of the docket, and his witnesses do not attend according to promise, &c. these are reasonable grounds for setting aside a nonsuit ordered for not being ready to proceed to trial.

This was, therefore, a motion to set aside this nonsuit.

The Judges, after hearing the reasons for and against this motion, said, that they had very frequently observed

Douglass v. Frissle.

causes postponed on very trifling pretences, and therefore it was necessary to attend strictly to the call of the dockets in the district courts, as many shameful delays had been experienced in them. But in this case it would be hard to cut the plaintiff off from a chance of justice, as he swears he was prevented by unavoidable accident from attending himself, and that several of his witnesses had promised to attend, but were prevented by a heavy fall of rain and freshes from attending. And although the promise of a witness to attend without a *subpœna* is not a good ground for putting off a trial, yet, when connected with the other circumstances in this case, it appears to be *a reasonable* ground within the discretion of the court.

Nonsuit set aside.

All the Judges present.

Columbia, 1802.

THE STATE *against* EDWARD FINDLAY.

A person seducing away from her father's house *a maid under sixteen years of age*, and deflowering her afterwards, without the consent of parents or guardians, is liable to five years' imprisonment, whether he marries her or not, under the statute of *5 Philip & Mary*, c. 8. made of force in this state.

MOTION in arrest of judgment.

The defendant was indicted on the statute of *5 Philip and Mary*, c. 8. made of force in this state, for taking away a girl under sixteen years of age, and deflowering her, without the consent of her parents. This statute enacts, that "if any person above the age of fourteen years, shall unlawfully convey or take away any woman child unmarried "within the age of sixteen years, from the possession and "against the will of the father, mother, guardians or governors of such child, he shall be imprisoned two years, "or fined, at the discretion of the justices; and if he deflowers her, or without the consent of her parents contracts "matrimony with her, he shall be imprisoned five years, or "fined, at the discretion of the justices; and she shall for-

"feit all her lands to the next of kin during the life of her "husband."

The State v. Findlay.

It appeared, from the report of the judge who tried the cause, (TREZEVANT,) that the parents of the girl were poor people, and upon observing too great a degree of familiarity between the defendant and their daughter, forbad him their house, and desired him to have no kind of intercourse with her, as she was a child incapable of judging for herself, and much too young to think of matrimony. That the defendant, however, contrary to their injunctions, still came about the house, as he alleged, to pay his addresses to her, and at length seduced her to go off with him, and had lived openly with her ever since, but whether married or not there was no proof; the parents however believed, and the presumption was, that they were not married. That in frequent conversations with different persons who censured him for his improper conduct in seducing away a child from her parents, he declared, and indeed in some degree boasted, that she was old enough, or woman enough for him, with other expressions of the same import. Upon this testimony, the jury, without any hesitation, found him guilty of the offence stated in the indictment.

The present was a motion in arrest of judgment, upon the ground that the indictment did not, upon the face of it, state this young woman to be a maid of the description and quality that the statute was meant and intended to protect; and, therefore, that the defendant was not subject to the pains and penalties of the act.

Mr. *Egan*, in support of the motion, argued, that the statute of *Philip* and *Mary* was made for the protection of heiresses and young ladies of fortune, who were in possession or in expectancy of lands and tenements, or other estates of great value, and to prevent their being taken off or married to persons of an inferior degree or condition in life; and that it was not meant or intended to extend to other persons than those mentioned in the preamble of the statute, to wit, heiresses and young ladies of quality.

The State v. Findlay.

Mr. *Stark*, the state-solicitor, observed, that to give the statute under which the defendant had been indicted the construction contended for, would be to subject a very large portion of the young women of our country to the seductive arts of lewd and unprincipled men; to the destruction of the peace of families, and the ruin and misery of the unhappy objects themselves, who have been or may be hereafter seduced and deceived. That it was to redress and prevent this great and growing evil, that the statute was made, which should not be confined to the wealthy and opulent alone, but extended to the poorer classes, who needed the aid of the law more than those in opulent circumstances.

The Court, after hearing the arguments, was of opinion, that there was not the least ground to arrest the judgment under this conviction. That the act in question was a wise and salutary one, well calculated to preserve the peace of families, to check and punish loose and disorderly men, and to promote the security and happiness of young inexperienced females of all descriptions, whether poor or opulent. That when this act, which had so long stood the test of experience and wisdom in another country, was extended to *Carolina* by our ancestors,* they could never have intended to discriminate or confine its operation to heiresses or persons of quality only, as there were then but few, comparatively, of that description in this quarter of the world. And although the preamble of the statute seems to relate to that class of young women more than any other, yet when the enacting clauses come to be attentively considered, they are sufficiently broad and extensive to include and protect all the young women of our country, of every degree and condition whatever.

* The act of assembly of *South Carolina*, extending the *British* statutes to this country, and among others the acts of 5 *Philip* and *Mary*, c. 8. passed in 1712, nearly a century ago.

The motion in arrest of judgment was therefore refused, and the rule discharged. The State v. Findlay.

All the Judges present.

As the defendant was unable to pay any fine, he was sentenced to five years' imprisonment, agreeably to the directions of the statute, as an example to all others of the same dissolute character.

N. B. This was the first conviction which ever took place in *Carolina*, under the statute of *Philip* and *Mary*, for this offence, and it is presumed it will have a lasting and salutary effect.

It may not be amiss here to observe, that it does not follow that because a statute has been a long time dormant, it is therefore to be considered as obsolete.* The contrary is evinced in this conviction and sentence.

* An act of parliament is not repealed by *nonuser*; as long as it remains unrepealed, the judges are bound to carry it into execution. 2 *Durnf. and East*, 275.

JAMES MASSEY *against* JAMES TRANTHAM.

Columbia, 1802.

TRESPASS to try title to an island in the *Catawba* river, in *Lancaster* district.

In an action to try *titles* to land under the act of 1791, some injury or trespass (however small) must be committed, *and proved* to have been committed on the premises, in order to maintain this suit.

Motion to set aside a verdict, and for leave to enter a nonsuit.

This action was brought to try the title to a small rocky island in the *Catawba* river, adjoining an island called *Fishing Island*, near *Rocky Mount*, a place celebrated for a shad fishery; the island was good for nothing else; the whole of it was a rock, but a very advantageous place for catching shad-fish in the spring of the year,

Massey v. Trantham.

The plaintiff, in support of his title, produced a grant dated 6th of *January*, 1794, for fifty acres of land, including part of *Fishing Island*, and, as was supposed, the place in dispute. One or two witnesses were called, who proved that this place had been called *Fishing Island* for 20 years past, and the part in dispute "*Little Island*;" that it was a flat rock about forty feet square, or nearly about the size of the site of the court-house here. The plaintiff rested his case upon his grant, and the explanations given by the witnesses.

Mr. *Richardson*, for the defendant, moved the court for a nonsuit at this stage of the cause, on the ground that the plaintiff had proved no trespass committed on the premises in question, nor that the defendant had ever been upon the rock; and that in this action, it was essentially necessary, that the plaintiff should prove that a trespass of some kind or other was committed by the defendant on the premises, before he could be entitled to a verdict.

Mr. Solicitor *James*, in reply, said that in the present action, which was solely for trying the right to the freehold, it was not necessary to prove any actual trespass, that the present action by the act of 1791, had been substituted for the old action of ejectment for trying title, where every thing was admitted or presumed, but the right and title only; and for this purpose, a clause in the act of 1792, amending the above-mentioned act, expressly directs, that the plaintiff when he sues out a writ of trespass for the purpose of trying title to land, shall mark on the copy of the process, that the action is to try title only; which was done in the present case. That the defendant's appearing, and putting in his plea to the action, was tantamount to the confession of lease, entry, and ouster in the old action of ejectment, where every thing was admitted but the title alone. Besides, he said, that it was difficult, if not impracticable, to prove that any actual trespass was committed on a solid rock in the middle of a river, where neither shrub nor twig was

growing, nor any other substance which was moveable. That the thing itself was not susceptible of external injury, and formed a marked exception to every other kind of freehold. Massey v. Trantham.

The presiding Judge (BAY) overruled the motion for the nonsuit, on the ground that he did not conceive it necessary in the action of trespass, to try titles to prove any actual trespass where the object of the suit appeared to be to try title only, and not for damages done the freehold, or for *mesne* profits. That the act of 1791, appeared to him to have a twofold object in view, first to abolish the old fictitious action of ejectment, and the string of subtilties attached to it; and at once, to go on to the trial of the right of freehold, in the real names of the parties claiming the land in dispute.

That in all cases, where damages were the object of the suit, an actual trespass must be proved; but where title only was the object, there it was unnecessary.

The defendant then went into proof of his title to the premises in question, and produced first, a grant to one *Platt*, dated 19th of *June*, 1772, for 180 acres of land, which it was alleged, included the whole of the rock in dispute; also, a deed of conveyance from *Platt* to himself for the same, dated 17th of *March*, 1795. Indeed, on inspection of the plat annexed to the grant under which the defendant claimed his title, this little island or rock was there very evidently delineated; and the explanation of one of the surveyors sworn on the trial confirmed it, though the surveyor on the part of the plaintiff was of a different opinion on that point. But from the evidence of the thing itself arising out of a view of the plat and situation of the premises, and the corroborating testimony of the defendant's surveyor, the Judge was strongly of opinion, and so charged the jury, that the defendant was entitled to a verdict. But the jury thought otherwise, and found for the plaintiff.

Massey v. Trantham.

1st. This was therefore a motion to set aside this verdict with leave to enter a nonsuit, or, if that should be refused,

2d. For a new trial, on the ground that the weight of evidence was strongly in favour of the defendant, on the real merits of the question.

As the first point submitted to the court was a new one, and turned upon the construction of the act of assembly, which had made so material an alteration in the law for recovering landed property, the Judges took time to consider this case, and after mature deliberation were of opinion, that the judge in the circuit court at *Lancaster*, should have sustained the motion for a nonsuit, as in every action of trespass on lands, it enters into the very nature and spirit of the remedy, that some injury, however small, shall have been committed on the premises; and unless something of that kind be proved on the trial, there is nothing for the jury on which to found a verdict. A bare threat on the rock to prevent the plaintiff from fishing, or any obstruction of that sort on the part of the defendant, or preventing a canoe from landing there, would have been sufficient for the purpose of supporting the action; but as nothing of that nature was proved, the cause of action failed and the defendant was entitled to a nonsuit. The act of 1791, did not alter the nature of the law, in order to enable a party to maintain an action of trespass; it only changed the old action of ejectment into an easier and more intelligible mode of trying titles to lands by this suit, but left all its essential requisites attached to it in every other respect.

As the Judges were of opinion that the defendant was entitled to a nonsuit in this case, they did not go into a consideration of the second ground, or motion for a new trial.

Rule for setting aside the verdict, and for leave to defendant to enter up the nonsuit made absolute.

All the Judges present.

JAMES COCKFIELD, a Minor, per Guardian, *against* JOSEPH HUDSON.

Columbia, 1802.

TROVER for a negro, *Sam*. *Marion* district. Verdict for defendant. Motion for a new trial.

Four years' possession of a negro or other chattel, will give a title to the possessor, and the statute of limitations will bar any other claimant from a recovery.

This was an action of trover, tried in *Marion* district, before Mr. Justice BREVARD, who reported that the plaintiff claimed under the will of his grandfather, *William Cockfield*, deceased, which was produced, and the defendant claimed under a parol gift from the same *William Cockfield* to his daughter whom defendant had married several years before the publication of the will. In order to rebut this parol gift to the defendant's wife from old *Cockfield*, the plaintiff proved a quiet and uninterrupted possession of the negro *Sam*, from the death of his grandfather, which happened in or about the year 1794, till the year 1802, between seven and eight years; and that after his grandfather's death, the negro had been delivered over to him by the executor of the testator, with the knowledge of the defendant himself. The plaintiff then pleaded the statute of limitations in bar to the defendant's claim.

The presiding judge then stated, that in his charge to the jury he mentioned, that whatever right the defendant might have acquired by the parol gift to his wife from his father-in-law, he had lost it by suffering the negro to remain so long in the adverse possession of the plaintiff, or his guardian, without bringing his action. That four years' peaceable possession of a negro, or other chattel, by a person claiming it in his own right, will, under our limitation act, give a title to the possessor, and bar any other person, however high his title may have been, from a recovery.

The jury, however, contrary to the opinions delivered by the judge, found for the defendant.

Cockfield v. Hudson.

This was, therefore, a motion for a new trial, as the verdict was alleged to be against law, and the charge of the judge who tried the cause.

The Judges, without argument, ordered the verdict to be set aside, and a new trial granted, without costs.

Present, GRIMKE, WATIES, JOHNSON, TREZEVANT and BREVARD.

Columbia, 1802.

THOMAS MUSE *against* SAMUEL LAUGHRIDGE.

Where there are two grants for the same land, the elder one shall always prevail; and although the younger grantee might have lapsed the right of the elder one by entering a caveat, and shewing that he had lost his right to preference before the passing of the elder grant, yet it is too late after the great seal is fixed to the elder grant.

This court cannot take into consideration the merits of the grantees; that was matter for the court of caveats, before the grant passed.

TRESPASS to try titles to land in *Fairfield* district. Verdict for defendant. Motion for new trial.

This case was tried before Mr. Justice TREZEVANT, who reported that the plaintiff, Mr. *Muse*, had surveyed the land in question on the 25th *September*, 1787, and took out his grant the 4th of *February*, 1793, upwards of five years after the time of his survey.

That the defendant, finding that the plaintiff had omitted to take out his grant for a considerable length of time, had it surveyed for himself on the 22d of *January*, 1793, and obtained a grant for it on the 1st of *July*, 1793, and the question was, which grant should have the preference.

The presiding judge, in his charge to the jury, told them, that the plaintiff was bound to take out his grant within six months after the time of the survey, which was in *September*, 1787, and after that time he lost his exclusive right to it, and any other person was at liberty to run it out. That defendant having done so, he then gained an exclusive right to it for six months after his survey, which was on the 22d of *January*, 1793, and his grant was taken out on the 1st of *July*, 1793, within the six months after the date of his survey. It was true, he said, the plaintiff had got a grant for

the land after the defendant's survey, on the 4th of *February*, 1793, but he conceived that grant of the plaintiff's void, under the 4th clause of the act amending the land act, (*Public Laws*, 400.) which enacts, " that a person making " a survey of land, shall be allowed six months to obtain a " grant for it, and in case of default within that time, any " other person may apply for and obtain a grant for it, on " payment of the fees; and any grant for the land within " six months from the time of its being surveyed, (*except* " *by the person for whom it was surveyed,*) shall be *ipso* " *facto* void." Under this clause he was of opinion that the plaintiff's grant was null and void; and the jury, according to his direction, found a verdict for the defendant.

Mr. *Smith*, in support of the motion for a new trial, contended, that the exception in the 4th clause of the act amending the land act, above quoted, expressly saved the right of the plaintiff, and that it should be construed to extend to persons in his predicament, still giving them the preference, if they thought proper to take out the grant, but declaring all other grants taken out within the six months, but to the one for whom it was originally surveyed, null and void. That it was the duty of the defendant, when he surveyed the land in *January*, 1793, to have entered a caveat before the governor and council, (forbidding all persons from taking out a grant for that land until he was heard,) who would then have determined who had the preference, and decided on the claims of the parties; but as he did not, there was nothing which stood in the way of the plaintiff from taking out his grant on the original survey, which had been regularly returned into the surveyor-general's office. By this means he might possibly have lapsed the plaintiff's right, and shewn that he had been negligent in not taking out his grant on his original survey within the time allowed by law, and that he had forfeited his claim; unless the plaintiff had on his part shewn sufficient reasons why he had delayed taking out his grant, which he might have done, and which would have been matter very proper for the consideration of the council

Muse v Laughridge.

board before the grant had passed. That, at all events, these were not points for the consideration of this court at this distant day, but were determinable by a competent tribunal, previous to the grant under the great seal of the state. That having regularly passed, the fee of the land legally vested in the plaintiff, and he was entitled to a recovery.

Mr. *Evans*, for defendant, against the motion, insisted, that the omission to take out the plaintiff's grant, on his original survey, within six months after the survey was made, amounted to a forfeiture of every right he had acquired by any previous steps he might have taken; and that the exception mentioned in the clause of the act amending the land act, should be construed to extend to the last person surveying the land, and not to the person who had been guilty of *laches* and delay in omitting to take out his grant after he had surveyed the land.

The Judges, after hearing the arguments, were in favour of a new trial, on the ground that it was incumbent on the defendant, when he had surveyed the land in question as lapsed land, to have entered a caveat against its being granted to any other person, until he was heard by himself or counsel on the merits of his claim. This would have been a sufficient notice to the opposite party to have come forward and shewn his reasons for so long a delay in perfecting his right, and also information to the council board that the land had been previously surveyed for another, by which means the whole merits of both the claimants would have come fully and fairly before the governor and council, who at that time formed the only tribunal competent to try and determine who were or were not entitled to the fee of the soil in question. But instead of pursuing this mode, which was the usage and custom in this country, from time immemorial, in regard to those disputed claims, the defendant appears privately to have surveyed his land, and obtained a grant for it, without any sort of notice either to the present plaintiff or the council board.

Muse v. Laughridge.

As, however, nothing stood in the way of the plaintiff when he perfected his grant on his original survey, which had been regularly returned into the surveyor-general's office, and his grant was the eldest, it unquestionably had a preference, and consequently the very reverse of the proposition is true, and the younger grant is null and void instead of the elder one.

Besides, they were all of opinion, that it would be introductory of much confusion and litigation, as had been well observed by the plaintiff's counsel, if the court should set afloat the grants of the state for matters previous to the passing of the grant under the great seal; (unless in cases of palpable fraud or imposition;) and the more especially, as there was a court of caveats then in the full exercise of all its functions, perfectly competent to hear and determine all such points.

Rule for new trial made absolute.

All the Judges present.

EDMUND STRANGE *against* NATHANIEL DURHAM.

Columbia, 1802.

TRESPASS to try title to land in *Fairfield* district. Verdict for defendant. Motion for new trial.

A person accepting a defective title to land, and going into possession under it, knowing the defect, may, after the expiration of 5 years, plead the statute of limitations in bar against any action brought against him for recovery of the land.

The land in dispute was granted to the plaintiff's father more than 20 years ago, and it was proved that the father was dead, and that the plaintiff was his heir at law. The defendant offered in evidence a conveyance made by the plaintiff's attorney, one *Andrew Kidd*, under which deed he claimed, but as the power was a joint one to the attorneys, four in number, and only one of them had made the deed, an exception was taken to it on the trial, as nugatory in itself, which was sustained by the presiding judge, TREZE-

Strange v. Durham.

VANT. At the same time, when this defective conveyance was made by *Kidd*, the defendant was apprized of the circumstance, but was told that he might purchase out the right of the plaintiff (who had removed to the state of *Tennessee*) upon very reasonable terms. Under these circumstances the defendant accepted the conveyance, and entered into possession of the premises in 1791, which he held without interruption till 1796, when an action was brought against him in *Pinckney* district; but as the plaintiff lived out of the state, security was demanded for payment of costs, which not being given agreeably to order of court, judgment of nonsuit was entered against him in *April* term, 1798. In the year 1800, one month before the expiration of the time for bringing a second action, the present suit was commenced. On the trial of this second issue, the defendant relinquished all claim under his deed from *Kidd*, the attorney of plaintiff, and rested solely on his possessory right under the statute of limitations. Against this right of possession it was alleged, that as defendant went into possession of the land by virtue of this purchase and deed from *Kidd*, which he knew to be defective, he could not afterwards relinquish his claim to it, and set up title by possession only, though it was admitted that he might have done so, if he had not accepted this conveyance. And of this opinion was the presiding judge in his charge to the jury, but they found a verdict for the defendant.

This was a motion for a new trial, on the ground of its being against law, and the charge of the judge who tried the cause.

All the other Judges concurred in opinion, however, that there should not be a new trial, as it could not vary the plaintiff's right of action whether the defendant knew that his title was good or bad. It did not depend on the defendant's knowledge or ignorance of the plaintiff's title, but on the statute, which had expressly taken away the plaintiff's remedy, unless his action had been commenced within five years from the time of defendant's entry upon the land.

Strange v. Durham.

And that it had been determined over and over again, that a defendant may defend himself by as many titles as he pleases to rely on, and if any one avails him in law it is sufficient; the others are nugatory, and go for nothing.

Rule for new trial discharged.

All the Judges present.

Starke, for the plaintiff.
Evans, for the defendant.

RICHARD STEEN *against* DRAKE & CAVENAH.

Columbia, 1802.

TRESPASS to try title to land in *Union* district. Motion to set aside nonsuit.

This cause was on the docket at the preceding court to the one when the nonsuit was ordered, to wit, in *November*, 1800, and according to the rule of court was regularly called as soon as the juries were made up and sworn at the *April* court, 1801, which was about 11 or 12 o'clock on the first day of court, but the plaintiff's witnesses not being ready, he made an affidavit of their absence and materiality, &c. in the usual form; when the court ordered the cause to stand over on the plaintiff's paying the costs within thirty days, or, in case of failure, being nonsuited. The costs not having been paid agreeable to the order of court, the clerk of the next succeeding court, to wit, in *November*, 1801, omitted to put the cause on the docket for trial, and signed an order for judgment of nonsuit. Mr. *Gist*, the plaintiff's attorney, as soon as he found there was an order for nonsuit

Wherever costs are ordered to be paid by either party to the suit while the cause is *in transitu*, the party who is bound to pay is to call and demand a taxed bill from the attorney of the other party, and to tender the money; but if his opponent is not ready to tender the bill when called on, then it is his duty to go and tender the bill to him who is bound to pay and demand the money.

Calling at the clerk's office, and demanding a bill, is not sufficient; the attorney on record is the person who represents the party on either side, and is the person to be called on for that purpose.

Steen v. Drake and Cavenah.

signed, moved the circuit court to have the order set aside, and the cause reinstated, upon the following grounds 1st. That no costs had ever been taxed as having accrued at the preceding court, as the plaintiff had called at the clerk's office to inquire what was to be paid, but could get no information on the subject; and, 2dly. That no judgment had ever been finally entered up, only an order for one, which he moved might be set aside, as he was then ready and willing to pay whatever was due. But the presiding judge (GRIMKE) refused to make the order, and confirmed the nonsuit for this supposed *laches*.

This was therefore a motion to reverse the order for the nonsuit, and to have the cause placed again on the docket for trial.

The judges, in order to settle the practice in our courts, resolved, that in all cases where either party, plaintiff or defendant, was ordered to pay costs, the party who was bound to pay should call on the attorney of the other party and demand his taxed bill within a reasonable time; and if the party who was to receive them, was not ready with his bill at the time appointed, then it was the duty of the party who was to receive them to call and offer his taxed bill for payment and demand the amount, without which he should not have the benefit of the order of court.

As, however, the obligation to pay the costs in this case was on the part of the plaintiff, at whose instance the cause was postponed, he should have called and demanded the taxed bill, and tendered the amount within the time prescribed by the order of the court, which had a right to impose terms on the parties; but as he made default, the defendant was regular in signing the judgment of nonsuit. That calling at the clerk's office for a bill was not sufficient; the attorney on record is the person who represents the

party, and the application should in all cases be made to him.

Steen v. Drake and Cavenah.

Rule for setting aside the nonsuit discharged.

All the Judges present.

N. B. This case is only important, as it settles a rule of practice in regard to payment of costs while a cause is *in transitu*.

WARREN HALL *against* DAVID WILLIAMS.

Columbia, 1802.

CASE from *Union* district. Upon a motion to have the costs of an action tried by a jury reduced to the same costs as on a summary process.

The plaintiff in this case, had a verdict for a sum under 20*l.* sterling, within the summary jurisdiction of this court, and, from his own books, the demand was plainly within the summary jurisdiction after all just credits were given.

Mr. *Nott*, defendant's counsel, moved, that the plaintiff should only have the same costs taxed him as are allowed on a summary process, in lieu of those usually taxed on an issue, tried in the court of common pleas by a jury of the country, and for that purpose quoted 3 *Will.* 48. as in point.

This was opposed by Mr. *Gist*, for the plaintiff, on the ground that the plaintiff had credited the defendant for cotton and other articles in his books, but had not carried out the prices in money, so as to reduce his demand below 20*l.* sterling; that these articles were of uncertain value, which

In an action of *assumpsit* where plaintiff recovers less than 20*l.* he shall recover no more than the costs on a summary process unless the debt be reduced by discounts, in which case if the demand was originally above 20*l.* he shall have full costs.

All payments made in cotton or other produce should be credited at the current price in the district, and the value thereof entered on the same day or carried out in plaintiff's books.

Hall v. Williams.

depended upon the state of the markets, and until the sales were made of them and an account received of the nett proceeds, the sums could not be carried out in the books which were produced, nor the exact balance struck.

To this it was replied, by Mr. *Nott*, that most of the payments in the country, were made to store-keepers and others in the public line, in corn, cotton, and other valuable staple commodities of the country, in the course of the year as the crops came round; and to suffer shop-keepers and others to recover the amount of their demands for goods, without deducting the payments made in the produce of the soil, would be an actual fraud, practised on the agricultural part of the community.

That it was the duty of every store-keeper, or other public dealer or trader, to give credit at the usual market prices in the country for all articles received in payment from the planters, on the day of delivery, and not to leave the value of these articles open for the purpose of giving what credits they pleased at a future day, when the prices might be considerably depressed in the market. That according to this rule, if the credits had been given in this case at the current prices in the country, the plaintiff's demand would have been reduced to 10*l.* the sum given by the jury, which is only one half of the sum which might be recovered in the summary jurisdiction of this court.

By the court, unanimously. All credits or payments made in the produce of the soil of the country, should be credited at the current value thereof on the day of delivery, and the value not be left open to be filled up at a future day, unless there be some contract to the contrary; otherwise, it would be opening a door for fraudulent practices on the part of store-keepers and country traders, which it is the duty of this court to prevent as much as possible.

That with regard to costs, it has often been determined in our courts, that where the plaintiff's demand was originally above 20*l.* but had been reduced by payments of any

kind to a less sum, he should only receive the costs of a summary process. But where there are mutual subsisting debts or demands between the parties, he shall have his full costs though the demand be reduced below 20*l.* sterling; because, the plaintiff when he brings his suit, cannot tell whether the defendant will set off his demand or not, as he may have his cross action, so that in such case he would lose all that part of his demand which exceeded the 20*l.* sterling; and so with respect to assigned notes or demands negotiated over to a defendant, of which a plaintiff might be ignorant at the time of bringing his action or suit. But, it is otherwise, in cases of payments made by the defendant to the plaintiff himself; they are not debts due and owing, but discharges *pro tanto*, and as it appears in the present case that the cotton and other articles were delivered in part payment of defendant's debt, their value ought to have been credited *pro tanto* on the days of delivery. The case cited from 3 *Will.* 48. is good law and in point on this subject, as also *Strange*, 1191.

Let the rule be made absolute for taxing for the plaintiff the amount of the costs on a summary process only, and let the defendant have his costs, all but what he would have been compelled to pay in defending himself against a summary process, to be deducted out of the amount of the verdict.

Present, GRIMKE, WATIES, JOHNSON, TREZEVANT and BREVARD.

Columbia, 1802.

DANIEL CARPENTER, guardian of sundry free negroes, *against* MATTHEW COLEMAN.

In an action to try the freedom of negroes; an order for security for their production and forthcoming on the trial, may be made at any time during the pendency of the suit; as also for good usage in the mean time, &c. &c.

UPON a motion made to reverse a decision made in the circuit court at *Camden*, in a case in nature of ravishment of ward, in order to try the right of certain negroes to their freedom, &c.

Some time after the commencement of this action, while the proceedings were progressing towards a termination, Mr. *Mathews*, the attorney of the plaintiff, made application to Judge BAY, at chambers in *Charleston*, for an order to the sheriff of *Camden* district, to oblige the defendant to enter into a recognisance in the sum of 200*l.* sterling, with good security, to produce the negroes at the trial, and in the mean time, to prevent them from being ill treated or abused, or carried out of the state till the right to their freedom could be determined, agreeably to the directions of the act of the legislature, in such case provided.

At the next meeting of the circuit court at *Camden*, after the above order was given, a motion was made for an order of court to rescind the said order made at chambers, on the ground, that the order should have been applied for and made before the suit was commenced, and not afterwards; in the same manner, that an order for bail is always made in a case of debt before the writ is served by the sheriff, and not afterwards.

The presiding Judge (RAMSAY) accordingly directed the order to be made, reversing the order at chambers.

This was therefore an appeal from the decision made by the circuit court at *Camden*, on the ground that the first order at chambers was correct, and in just conformity to the directions of the act.

The Judges after due consideration, were all of opinion, that the order made at chambers was properly made under the directions of the act, and that such order may be made

at the commencement of that suit, or at any time during the pendency thereof, if the guardian of the negroes claiming their freedom, should suspect that the defendant will either remove them out of the jurisdiction of the court, or use them ill; but if he is under no such apprehension, he may omit it entirely if he pleases.

Carpenter v. Coleman.

Rule for reversing the order of the circuit court at *Camden*, and confirming the order at chambers, made absolute.

All the Judges present.

JAMES UNDERWOOD *against* GEORGE EVANS.

Columbia, 1802.

TRESPASS to try title to land. Motion to set aside nonsuit.

When this cause was called for trial, a Mr. *Dubose*, a surveyor, was offered as a witness to prove a plat and resurvey of the land in question; and upon being asked whether he was a sworn deputy under the surveyor-general, answered in the negative; whereupon,

Mr. *Falconer*, as the attorney of defendant, objected to his being sworn, contending, that none but regular sworn deputies under the surveyor-general of the state could regularly make surveys under the rules of this court, as no other could swear the chain carriers, or be known as regular officers appointed by due authority. He also observed, that this was an *ex parte* survey, made without due notice to his client of the time when it was to be made, agreeably to the rule of court; so that the plat was inadmissible on both these grounds. He said, that he made this objection at the threshold of the cause, as it had been determined that it was too late to make the exception after the surveyors were sworn, and the parties had gone into the cause.

All rules of survey under the authority of any circuit court, are to be directed to sworn surveyors under the surveyor-general only, as no others are under oath or can swear the chain carriers; and no *ex parte* survey or plat can be received or offered in evidence to a jury, unless due and reasonable notice be given to the opposite party of the time of making it, and he neglect or refuse to attend, which must be proved to the satisfaction of the court before it is received.

Underwood v. Evans.

Mr. *Mathews*, for the plaintiff, could not deny that the survey was an *ex parte* one, alleging, however, that the defendant might have attended if he pleased, as he had several days notice, but he was not prepared to prove such regular notice; whereupon,

Mr. *Falconer* moved for a nonsuit, which was accordingly ordered by the presiding Judge (RAMSAY.)

This was therefore a motion to set aside this nonsuit, upon the ground of its having been irregularly ordered; but,

The court refused the motion unanimously, being of opinion, that all rules of survey to be made under the direction of any of the circuit courts in this state, should be directed to sworn deputies under the surveyor-general; as no others were under oath to perform their duty faithfully, and no others could swear the chain carriers to do impartial justice to the parties, unless in cases where both parties agreed and fixed upon a surveyor themselves, in which case their agreement would be binding, and would form an exception to the general rule, as well with respect to the surveyor as to the chain carriers.

And with respect to making *ex parte* surveys, none such ought ever to be received or offered in evidence to a jury, unless in cases where one of the parties was ready to go on and make the survey with his regular surveyor, and had given the opposite party regular notice of such his intention, a reasonable time before such survey was to be made. Then, if the party so notified, refuses or neglects to attend with his surveyor, the party ready and desirous of making the survey, may go on and make his survey, which may be received in evidence upon the party's proving the due and regular notice, and the neglect or refusal of the opposite party to attend.

Rule for setting aside the nonsuit discharged, as it appeared to have been regularly ordered.

All the Judges present.

NEILSON *against* EMERSON.

Columbia, 1802.

SLANDER. Verdict for plaintiff. Motion in arrest of judgment.

In slander, if some counts in the declaration are good and others are bad, a general verdict will support the good ones.

Mr. *Blanding*, in support of this motion, stated, that the plaintiff's declaration contained three counts; one for calling the plaintiff *a hog thief*, another for calling him *a damned hog thief*, and a third for calling him *a forsworn rascal*. That the last words were not actionable, being mere words of heat and passion, and as the jury had found a general verdict, without distinguishing on which of the counts they founded it, the court could not say on which of them the judgment should be entered up; and, therefore, for this defect or irregularity, he prayed that the judgment might be arrested.

The court, without further argument, dismissed the rule upon the authority of *Neal* and *Lewis's* case, tried in *Charleston*, in 1798, where it was determined, that if any one count in a declaration for slander was good, it was sufficient to found a judgment on upon a general finding.

Rule discharged.

All the Judges present.

Columbia, 1802.

JOSEPH HORT *against* ELIJAH JONES.

VERDICT for plaintiff. Motion for a new trial.

In order to put off a trial, some good grounds ought to be assigned as reasons to the court for delaying either party who was ready An agreement not to press on a cause until both parties were ready is not a sufficient reason for delay, as it might happen that one of them might never be ready. See this case, *ante*.

In this case, it was alleged as a ground for this motion, that the defendant was hurried on to trial by surprise, when he was not ready; and *that* after an agreement between him and the plaintiff, that the cause should not be hurried or pressed on to trial, till both parties were ready. But it was admitted, that none of the affidavits stating these facts had been offered or submitted to the circuit court as grounds for putting off the trial, but all made since as grounds for the motion for a new trial.

The court observed, that they had gone quite far enough in the case of *Douglass* and *Frizzle*, in which case, however, the plaintiff had sworn, that he was prevented from attending court in time by unavoidable accident, which was not denied, and that his witnesses were also prevented by accident. In the present case, however, nothing appeared or was assigned as a reason for the defendant's not being ready for trial, or for preventing the attendance of his witnesses, but an agreement that the cause should not *be hurried or pressed on till both parties were ready*. This, they observed, was an agreement, which trifled with the rules and justice of the court, as it was easy to see, that an artful designing man might turn such an agreement into a pretext for delay as long as he pleased, as peradventure he never might be ready.

Rule for a new trial dismissed.

All the Judges present.

DAVID HOPKINS *against* ALLAN DE GRAFFENREID. *Columbia,* 1802.

TRESPASS to try title to land. Motion to set aside nonsuit.

This was a case from the former district of *Pinckney*, in which there had been a former nonsuit on account of the plaintiff's failure in proving a deed; (see that case, *ante*, 187.) and on the second trial after the former nonsuit was set aside, the plaintiff was nonsuited a second time for not *producing the fi. fa.* by virtue of which the sheriff of *Old Camden* district, had sold the premises in question to the plaintiff. The Judge (GRIMKE) who presided when this second trial came on, was of opinion, that the *fi. fa.* was an essential link in the chain of title to shew the sheriff's authority for selling; and as that was not produced, or its loss satisfactorily accounted for, he directed a second nonsuit.

This, therefore, was a motion to set aside this second nonsuit.

Mr. *Smith*, for the motion, took two grounds; 1st. That the presiding Judge ordered this nonsuit without the consent of the plaintiff in the action, who was willing to risk his case with the jury; and, 2dly. That the execution, or *fi. fa.* was not essentially necessary to be shewn on a trial for lands, where a title depends on a sheriff's deed or conveyance.

Upon the first ground, he contended, that when a jury is once sworn upon a cause and charged with the evidence, the judge cannot discharge them from that cause till they give their verdict without the plaintiff's consent. That if the plaintiff thought proper to risk his cause to a jury upon such evidence as he could procure, or such as he thought would bear him out in his case, a judge should not step in between him and the jury and prevent them from giving in their verdict; nor can a judge regularly order the plaintiff to be nonsuited against his will and consent, so as to deprive

1 Lord *Raymond*, 129. 1 *Cromp.* 257.

Hopkins v. De Graffenreid.

him by such order of the benefit of the inestimable trial by a jury of the country. 2 *Durnford and East*, 275. 281.

2dly. In respect to the *fi. fa.* he said, it was not essentially necessary to be produced on the trial, where the title depends upon a sheriff's deed. It is the judgment that binds the lands of a defendant and makes them liable for the debt of the plaintiff; an exemplification of which was produced on the trial. This proved that the lands in question were bound for the satisfaction of the judgment; the execution afterwards, was no more than the mandatory of the court, commanding the sheriff to give the plaintiff the fruits of his judgment, by selling the land and raising the money to be paid over to the plaintiff. This was only the sheriff's warrant for his proceedings, and a *bona fide* purchaser had nothing to do with it. That a sheriff was a public officer of great trust and confidence, entrusted with the final execution of the law, and therefore the law would always presume strongly in his favour, or in the regularity of his proceedings, until the contrary was made to appear. In the deed offered in evidence, the sheriff had recited the suit and judgment, and referred to them on record as the foundation of all the proceedings, and the right of the plaintiff in this suit. He then recited the execution or *fi. fa.* and levy on the lands; next the advertising, and sale to the plaintiff, as the highest bidder. Why stop at the execution and require its production? Why not call for proof of the levy, the advertising and sale to the purchaser? They are all as essentially necessary as the execution itself; but this would be going too far, and would look too much like making trifling objections without weight or substance. The answer to all these objections, however, and the truth is, that they are all the necessary concomitants and attendants on such kind of legal transactions, without which the plaintiff in an action never could gain the fruits and ends of his suit; and, therefore, the law rejects all these little niceties as unworthy of its notice, and will presume in favour of such important rights, and also in favour of an officer of such high trust, that all has been done which ought to have

been done; and these are not light presumptions, founded on trivial circumstances, but strong presumptions arising from the nature and course of proceedings by executive officers. Besides, he further observed, that it was well known both to the bench and the bar, that a sheriff in the execution of his duty, is very often obliged to make partial sales of lands where a defendant has a number of tracts, one to *A.* and another to *B.* and so on to others again, and still the proceeds may not be sufficient to pay off the amount of the plaintiff's judgment. Now, how is it possible in such a case, that any one of the purchasers can get possession of the execution under which these partial sales were made? It is therefore most evident, that the execution makes no part of the purchaser's title under a sheriff's deed, nor can any purchaser compel a sheriff to deliver it over to him; on the contrary, the sheriff is bound in duty to return all such executions into the court from which they issued, in order that the court may see how much of the judgment is satisfied and paid over to the plaintiff, and how much is still due in cases where further proceedings may be necessary. But, he said, it was notorious that the sheriffs and their deputies had been very remiss in returning executions into court. It was one of the great evils complained of in this country previous to the act of 1791. Hundreds of executions have either been kept back, lost or mislaid in the course of this irregularity, that cannot possibly be produced or accounted for by innocent purchasers. To call in question, therefore, the rights of parties to lands fairly purchased at sheriffs' sales for the want of the execution, under all these circumstances, would be the height of injustice, and would jeopardize the greatest part of the titles to lands in *Carolina*, purchased at said sales.

Mr. *Nott*, in reply, urged that the execution should be produced, as probably it might appear that the debt had been satisfied. If so, then the sheriff had no right to sell. At all events, it should be produced to shew the sheriff's authority to seize and sell, and that the sale was made in

Hopkins v. De Graffenreid.

pursuance of that authority, and while the execution was in full force; for if the sale was made after the active energy of the execution had ceased, the sale would be illegal. He quoted the case of *Bullock* and *Thompson*, at *Ninety-Six*, where he said, he understood it had been determined, that the execution should be produced, and a sheriff's deed had been rejected on account of its non-production.

On the other point respecting the nonsuit, he observed, that it was the province of the judges to determine the law, and juries the facts. That if it appeared to a judge that no legal evidence was offered to support a suit, or, as in the present case, the plaintiff's title, of which the judge only was competent to determine, it was his duty to direct a nonsuit; for, it would be a nugatory act to send a case to a jury, where there was no legal evidence to support it; and whatever the old practice might have been in *England*, of the judges not ordering a nonsuit without consent of the plaintiff, when they discovered a defect of evidence, it was neither founded in good sense nor sound reason; and modern adjudications have determined otherwise. In this country it is invariably the practice for the judges, in all cases, to exercise that discretionary power which the law has vested in them, wherever they have discovered a defect of evidence to support the plaintiff's claim.

Falconer, on the part of the defendant, supported Mr. *Nott*, and argued, that whatever might have been the conduct of sheriffs hitherto, in not returning executions into the clerks' offices, it should not prejudice the citizens, whose rights were to be called into question by sheriffs' sales. The sheriff's authority to sell ought to be shewn, by which he was to devest a defendant of his landed property, and transfer it to another. Nothing should be left to presumption or intendment, which went to deprive a man of his freehold and inheritance. There were few or no cases in the *English* reporters to aid us in a case of this kind, as landed estates could only be extended for debt in that country. Our country must, therefore, resort to principles to bear them

out in their decisions here, and where no power is shewn to sell, none is to be presumed.

Hopkins v. De Graffenreid.

The majority of the Judges, in this case, after due consideration, were of opinion, that the nonsuit ought to be set aside, and the cause once more reinstated on the docket for trial, on the second ground taken in support of this motion.

On the first ground, however, they concurred in opinion with the other judges, in principle, that on a trial before a jury, wherever it appears that the evidence is insufficient to make out the plaintiff's case, or where there is a total failure of proof necessary for that purpose, it is the duty of the judge to order a nonsuit, whether the plaintiff consent or not, because there can be nothing to send to the jury to found their verdict upon, and, consequently, any verdict they could give would be a nugatory act. That this point had been determined in the case of *Brown* and *Frost*, after solemn argument, in *Charleston*, in 1798, and it had been the invariable practice both before and since.

See the case of *Brown* and *Frost*, *ante*, p. 126.

On the second ground, with respect to the production of the writ of *fi. fa.* on the trial of an issue, where the plaintiff's title to lands depends upon a sheriff's deed, they were of opinion that it was not necessary to produce it. That these sales being made by operation of law, and by a public officer, entrusted with the execution of the law, duly appointed and sworn for that purpose, the same degree of faith and credit is due to his deed, under hand and seal, as could or ought to be given to any return on the back of an execution, if it had been produced, for the one act is as much the act of the sheriff, and as much within the line of his official duty, as the other; and they are equally entitled to credit in the eye of the law.

In private transactions, where men act as agents or attorneys for each other, in pursuance of private powers, their authority must be shewn, and nothing is to be presumed in such cases but what is proved. Whereas, in the execution of the law, and in pursuance of a public authority,

Hopkins v. De Graffenreid.

founded on the proceedings of the courts of justice, every thing concomitant with the execution of a public trust by the officers of justice is to be presumed in their favour, until irregularities or violations of their duty are shewn; especially after a lapse of years, when it would be as difficult to shew that every punctilio of the law was complied with in making a sheriff's sale, as it would be to shew that all the requisites of the rules and practice of the court had been complied with before the judgment was entered up.

The recitals in a sheriff's deed, under his hand and seal, ought to be received as an official return of his proceedings in the final completion of the suit, as much as his return to any part of the proceedings in the cause, from the service of the first process down to his giving the plaintiff the fruits of his judgment; and the law will not presume that the sheriff has done wrong, or certified what is not true. Another strong reason why great faith and credit ought to be given to so high and confidential an officer of justice, is, that it very frequently happens that partial sales are made under the same execution, and that several separate tracts of land are sold to different persons. It is, therefore, impossible that each purchaser can have the execution delivered over to him. This circumstance is a strong proof that the law never intended nor contemplated that the execution or *fi. fa.* under which lands were sold, should be delivered to the purchaser, or make any part of his title. On the contrary, the law requires that the execution should be returned into the prothonotary's office by the sheriff, that the court might see that justice was done the plaintiff in the action; and if need should require, that further process might be awarded for that purpose, if the plaintiff was not fully satisfied. It is evident, therefore, that this writ is under the power of the sheriff, until this final return is made. A *bona fide* purchaser has no control over it; and it would be unjust if he should suffer for any neglect or omission of the sheriff, after he had fairly and honestly paid away the purchase-money, and obtained his deed.

Hopkins v. De Graffenreid.

It is a notorious fact, however, that the sheriffs of this country, and their deputies, were very negligent in making returns to executions, in many parts of the country, after the revolution; and many of them still are so, notwithstanding the act of 1791, which was intended, among other things, to guard against that inconvenience. To make their misconduct or irregularities the ground of shaking the titles of those citizens who hold lands under sheriffs' deeds, would be extremely injurious to a large portion of the citizens of this country, and subversive of the ends of justice.

The case of *Bullock* and *Thompson*, quoted in the course of the argument, did not turn on the production or non-production of the *fi. fa.* under which the land was supposed to have been sold, but on the want of an exemplification of a judgment, which it was alleged had been obtained, and which, consequently, bound the lands then in question; and it was upon that ground that the sheriff's deed, which was then offered in evidence, was rejected, as there was nothing before the court to evince a judgment or any subsequent proceedings. There was nothing in that case which had any application to the one now under consideration.

See the case of *Bullock* v. *Thompson*, vol. 1. p. 364. *Riley's* edit.

Mr. Justice WATIES dissented from this opinion of the majority of the judges, and agreed with the presiding judge on the trial, (GRIMKE,) that the *fi. fa.* was an indispensable requisite in the chain of title under a sheriff's deed, and that it should be produced, or its loss satisfactorily accounted for; and, therefore, that the nonsuit was very regularly and properly ordered.

Rule for setting aside the nonsuit, and reinstating the cause on the docket a second time, made absolute.

Present, GRIMKE, WATIES, BAY, JOHNSON, TREZEVANT and BREVARD.

Columbia, 1802.

WILLIAM DICKSON, surviving Executor of JOHN DICKSON, deceased, *against* JOSEPH BATES.

Where all the witnesses to a will are legatees, and are to take a beneficiary interest under it, none of them can be permitted to prove it, unless a release is given by the legatee who is offered as the witness.

TRESPASS to try titles to land in *Pendleton* district. Motion to set aside nonsuit.

This case turned in a great degree upon the will of the testator, *J. Dickson*, deceased, but all the witnesses to the execution of it were legatees, and were to take a beneficiary interest under it. In support of the plaintiff's title, it was urged, that one of the legatees at least ought to be permitted to prove the execution of the will, *from the necessity of the case*, as without it a manifest injury would be done to the plaintiff in this action. But the presiding judge would not permit either of them to be sworn.

The defendant, therefore, moved for, and the court ordered, a nonsuit. This was, therefore, a motion to set aside the nonsuit.

But the Judges refused the motion, observing, that the decision in the circuit court was correct, unless one of the witnesses had released his interest; then he might have been a competent witness, but not otherwise.

Rule to set aside the nonsuit discharged.

All the Judges present.

HAWKINS *against* HALL and others.

Columbia, 1802.

UPON a claim of dower. Motion to reverse the order of the circuit court, setting aside the return of the commissioners, &c.

Where the commissioners in a writ of dower assign to a widow more than by any rule of law she is entitled to, the proceedings ought to be set aside for this irregularity.

In this case the commissioners made a very uncertain return to the writ of dower issued to them, and it was apparent that they had given the widow more than one third of the land she was entitled to, according to their own calculation, to the injury of the heirs and others claiming the residue; upon which the presiding judge directed all the proceedings to be quashed, upon the ground of this irregularity.

This was a motion to rescind the order of the circuit court, and to confirm the return.

But *the Court* refused the motion, observing, that whenever it appeared from the return of the commissioners themselves that they had given a widow more than she was entitled to, the proceedings ought to be set aside; for although the claim of a widow's dower is highly favoured in law, yet there are other parties whose interests ought to be protected by the courts of justice.

Rule dismissed.

All the Judges present.

Columbia, 1802.

THOMAS SUMPTER *against* WILLIAM MURRELL.

Where arbitrators are not guilty of misconduct, nor have committed any great mistake, the court will not open an award, but hold the parties to their decision.

MOTION to reverse the order of the circuit court at *Sumter* district, confirming an award.

The ground upon which the counsel, Mr. *Mathis*, rested this motion, was, that the arbitrators had made a great mistake in this case, by not giving defendant credit for a family of negroes sold to the plaintiff, of the value of 175*l.* sterling, which mistake was a sufficient ground for setting aside the award in this case, and had been urged in the circuit court against the motion which was made to confirm the award, but he was overruled in his objection. The presiding judge reported, that a certificate was produced from the arbitrators, that they had been of opinion when they were investigating the accounts between the parties, that the negroes in question had been given by Mr. *Murrell* to the plaintiff in payment for land purchased of him, and, therefore, did not form an item in the accounts for their consideration.

The Judges, after considering this case, were of opinion, that if so great a mistake as that stated by the defendant's counsel had really been committed by the arbitrators, it would have been a very reasonable ground for setting aside the award; but the reason assigned by the arbitrators, shews that they had taken the value of the negroes into consideration, and had been of opinion, that they had been given in payment of a land purchase which did not come before them, and which sufficiently removes the impression as to the alleged fact of its being a mistake or an omission on the part of the arbitrators.

That the court had on repeated occasions set their faces against the opening of awards, unless for misconduct on the part of the referees, or for some palpable mistake or omission, which did not appear in the present case. They were judges and juries of the parties' own choosing, and therefore

it was both reasonable and just, that they should be bound by their decisions, and that these should not lightly be set aside.

Sumpter v. Murrell.

Rule for reversing the decision of the circuit court dismissed.

All the Judges present.

THE STATE *against* ADAM FOWLER BRISBANE.

Columbia, 1802.

MOTION in arrest of judgment on a conviction at *Camden*, upon an indictment for an assault.

Where *time* and *place* are set forth in the caption of an indictment with sufficient certainty to a common intent, legal subtleties and niceties are to be disregarded.

In all public prosecutions on the part of the state, where defendant or prisoner calls no witnesses, his counsel is entitled to the last word or the privilege of concluding the arguments to the jury, notwithstanding the former practice to the contrary.

Mr. *Falconer*, in support of the motion, stated that the ground upon which he meant to rely, was an error in the caption of the indictment, as it did not state that the court was held *at Kershaw court-house*, agreeably to the directions of the act of the legislature, creating a district court in the former county of *Kershaw*. And, therefore, he contended, that the caption did not state that the court was held in the place appointed by law, but in some other place not designated by the act for that purpose; and, consequently, that the conviction was irregular, so that no judgment ought to be entered up on it. He laid it down as strict law, that if an act of parliament appoint *a place for holding a court*, every caption of an indictment ought to shew that the court was held at *such identical place, and no where else;* otherwise, it is insufficient and faulty. *Dyer*, 135. 2 *Hawkins*, 255.

The *Solicitor*, in reply, observed, that the principal object of every caption to an indictment, was to shew the time and place where the court is held; that it might clearly ap-

The State v. Brisbane.

pear that the court was held at the time mentioned and prescribed by law, and that the place was within the jurisdiction of the court. If this be done with sufficient certainty, it is all that the law requires. That the *time* and *place* were sufficiently set forth in the present indictment, would evidently appear on a bare perusal of it; there was no objection taken, he said, to the *time*, only to the *place*.

The indictment, he said, was in the usual and common form, and headed in the accustomed style, "*State of South* "*Carolina.*" "*Kershaw district.*" It then proceeds to state, that a court of general sessions of the peace, oyer and terminer, &c. *was held at the court-house of the said district*, &c. This, he contended, was so descriptive of the place where the court was held, that the mind of man could not possibly be mistaken in it, or suppose it was held in any other place than in *Kershaw court-house*. There is no ambiguity or uncertainty in it; it is as descriptive of the place as language can possibly make it. As to the nicety and exactness laid down in some of the old antiquated *English* reporters, it was a disgrace to the law at this enlightened period, and has justly brought down a reproach upon it. A sufficient degree of certainty to shew the *time* and *place* is all that the law requires, and that is well laid in the caption of the indictment under consideration.

The Judges held, that the objection taken on the present occasion was a frivolous one, and unsupported by law or common sense. Time and place were as well set forth in the indictment under consideration as they possibly could be, and in language more appropriate and law-like than the act itself.

Rule for arresting the judgment was dismissed.

There was, however, another ground taken which did not relate to the merits of this case, and is only worthy of notice as it tends to settle a point of practice for the regulation of the bar in future: it was this. The counsel for the defend-

ant stated, that he had called no witnesses on the trial at *Camden*, and therefore claimed the privilege of concluding the arguments to the jury which had been refused him. He said, he had claimed this as a right on behalf of his client, not so much on account of any great benefit he was to derive from it in this case, as to have the point settled as a rule hereafter. He admitted, that it had been formerly the practice, to allow the *Attorney-General*, and *Solicitors*, in all public prosecutions on the part of the state, the privilege of opening and concluding the arguments in every case addressed to the jury. This, he said, was a partiality shewn to the public officers of the state, which in justice they were not entitled to. It was a relict of the kingly prerogative, which he hoped to see abolished in this country, and a practice more agreeable to the rights of freemen introduced. The state, he observed, was a body politic, formed by universal consent for the protection and defence of the rights of the citizen. These rights, he said, were of primary consideration, and should be put upon the same footing with those of the body politic, so as to make them perfectly reciprocal. In civil cases they were so, for it was a rule in the court of common pleas, in all cases where a defendant calls no witnesses, that he should be entitled to the last word, or the privilege of last addressing the jury; and the same rule ought to prevail in a criminal court; indeed, he thought it much stronger in a criminal case, inasmuch as a man's life and liberty were much dearer to him than property.

The *Solicitor* did not appear to be very solicitous about this point, as he conceived the ends of justice in no wise concerned in it. He had found the practice as had been stated by his opponent, when he came into office, and as far as he was concerned, he was perfectly willing to submit it to the court, to make any rule upon the subject which might be most convenient or consonant with justice.

The Judges, after consultation on this last point, observed, that they considered the rights of the citizen upon a perfect

The State v. Brisbane.

equality with those of the state, and they saw no good reason, why the latter should have any exclusive advantage or privilege in which the former should not equally participate. No good reason could be assigned, why a body politic should have higher rights than those who were protected by it. It was created by the people for the benefit of the people, and each individual ought to have every advantage which the aggregate had, otherwise there would not be a perfect reciprocity between the state and the citizen. They were therefore of opinion, that in future, the same rule ought to prevail in the criminal courts of judicature, which had been laid down in the court of common pleas. That in all cases where a defendant called no witnesses, he should have the privilege of concluding to the jury.*

All the Judges present.

* This rule has been invariably observed in all the criminal courts throughout the state, as well as in the courts of common pleas ever since the above determination; so that it may now be considered as a standing rule of practice in our criminal courts of judicature.

Columbia, 1802.

MOUNCE *against* INGRAHAM.

Where there have been contending claimants for a grant of vacant land, and the merits have been heard and determined by the court of caveats, a court of common law will never suffer those merits to be again opened, or any evidence offered about the priority of right previous to the date of the grant.

TRESPASS to try title to land in *Lancaster* district. Verdict for defendant. Motion for new trial.

This was an action of trespass to try title to land. There were two grants for the same tract of land, and the question was, which of them should have the preference.

Mr. *Blanding*, for the plaintiff, who held the junior grant, in support of this motion, stated, that there was a

mistake in the dates of the grants; that the grant to his client was at first filled up in 1785, and afterwards altered to the 1st of *June*, 1786, which was a mistake or fraud practised on the plaintiff. That in the mean time, between the first date of the plaintiff's grant and the 1st of *June*, 1786, the day of the alteration, the defendant had obtained a grant, which was dated before the 1st of *June*, 1786, by which means he had obtained a priority in point of time. This, he contended, was either a gross mistake, which ought to be corrected by a verdict of a jury, or a palpable fraud committed upon him, which was equally within the province of a jury. That although mistakes and frauds were originally branches of the jurisdiction of the courts of chancery, yet our courts had liberalized the doctrine of late, so far, as to suffer them to go to a jury, where they could be traced out, or made to appear in a court of common law as well as in a court of equity. He therefore prayed, that this case might be sent back to a jury, in order that the fraudulent circumstances of the case might be more fully investigated.

For defendant, it was insisted, that this was neither a mistake or fraud committed upon the plaintiff, but the result of deliberate justice done to the parties, by a court of competent jurisdiction. It was admitted, that there was an alteration in the plaintiff's grant, but the justice of the case rendered it necessary, that such alteration should be made. The plaintiff had included in his survey a part of defendant's land, and the matter had been submitted to the court of caveats before either of the grants passed, where the case had been depending till the 1st of *June*, 1786, when the governor and council who then formed the court, decided in favour of the defendant, and gave him the priority. That in consequence of this decision, a note or memorandum was made by the secretary of state, assigning this dispute about the lines as the reason why the plaintiff's grant had been so long delayed, and that it had not been finally determined till that day; consequently, the defendant's grant by that means gained the priority, as in the mean time his

Mounce v. Ingraham.

grant had been signed and passed under the great seal of the state.

The plaintiff, however, still insisted upon going into the merits of the original surveys, alleging he had a right to the priority, notwithstanding the decision of the governor and council to the contrary. But the presiding Judge refused to permit him to go into any evidence of that kind, holding, that he was precluded by a court of competent jurisdiction, which had determined the point; and the jury under his direction, found for the defendant.

This, therefore, was a motion for a new trial, on the ground of misdirection.

When after hearing the parties, the Judges were unanimously of opinion, that the presiding Judge had, on the trial of the cause, very properly rejected the testimony offered. That the governor and council at that time constituated a court of caveats, for the express purpose of hearing all disputes between applicants for grants of the vacant lands of the state, and finally determining who had the best right to the lands claimed by the contending parties; and having made that determination, the parties themselves, and all claiming under them, were for ever concluded and bound by such decision; and that a court of common law jurisdiction, would not go further back than the date of a grant, as it is then that the fee of the soil vests in the grantee. The right of the state then ceases, and that of the individual commences.

The determination of this kind of questions, about the priority of right to the vacant lands, was formerly a branch of the royal prerogative; but upon the revolution in *America*, it was transferred to the governor and council of the state, whose decision was conclusive.

Rule for new trial discharged.

All the Judges present.

M'Fadden and Wife *against* Edward Haley.

Columbia, 1802.

TRESPASS to try title to land, in *Sumpter* district. Nonsuit ordered. Motion to have the order for nonsuit rescinded.

Where one joint tenant or tenant in common sues for the whole of a tract and only proves himself entitled to one-third, he shall not be nonsuited on that account, but shall have his verdict for that part to which he is entitled; and the judgment shall be moulded on it so as to answer the ends of justice.

The plaintiffs deduced a regular title to the premises in question, to one *James Dickey*, deceased, the former husband of Mrs. *M'Fadden*, from *Arthur Graham*, who obtained a grant for the same on the 8th of *February*, 1773; and it appeared in evidence, that the said *James Dickey* died intestate, leaving behind him his widow and three children; and that after the death of *Dickey*, his widow intermarried with the plaintiff, *Robert M'Fadden*, before the commencement of this action.

The defendant set up a title to the land, under a grant to one *Doughty*, in *June*, 1786; but could not make out any title to himself. He then moved for a nonsuit, on the ground, that it had appeared in evidence from the plaintiff's own shewing, that his wife was only entitled to one undivided third part of the land, under our act of distribution of intestates' estates; whereas, by the declaration, it appeared he had sued for the whole.

The defendant's counsel observed, that the plaintiffs' writ demands the whole land, when in fact he had proved himself entitled only to one undivided third. He then contended, that a joint-tenant, or tenant in common, could not maintain a separate suit without summons and severance; and it was not even alleged, that there had been any partition made in the present case.

The presiding Judge (Johnson) was with the defendant on the first ground, being of opinion, that if the plaintiff had intended to claim only an undivided third, he should have sued for that third and no more; and upon this ground the nonsuit was ordered.

M'Fadden & wife v. Haley.

This, therefore, was a motion to set aside that nonsuit.

In support of the motion, Mr. *Blanding*, in behalf of the plaintiff, contended, that if the defendant had meant or intended to have taken advantage of this point, on which the nonsuit was ordered, he ought to have done it in pleading; and that it was too late after the general issue pleaded. For it is clearly laid down, that one joint-tenant, or tenant in common, cannot maintain an action against another, because possession of one is possession of both, and if he does, it is good evidence upon not guilty. But if one joint-tenant or tenant in common, brings an action against a stranger, in that case a defendant may plead it in abatement, but cannot take advantage of it in evidence. *Salk.* 290. 2 *Lev.* 113. *Cro. Eliz.* 544. But he urged, that although one joint-tenant could not bring an action of trover against another, he might against a stranger. So he might maintain *quare clausum fregit* against a stranger, because the damages in such case shall enure to the benefit of the whole. Tenants in common may bring separate actions for their shares. *Runnington*, 94. So where a man sues for the whole, or one half, he may recover according to the extent of title or right, a third, a fourth, or one half. *Runn.* 103. 1 *Esp.* 117. So also it is laid down in the case of *Denn* v. *Purvis et al.* 1 *Burrows*, 326. *that a part* may be recovered on a *demand for the whole.* This last case, he said, was so full upon the point before the court, and referred to so many authorities on the subject, that he would not dwell longer on it, but submit the case to the court.

Mr. *M'Credie*, contra, observed, that as the plaintiff in this action, had not stated himself to be a joint-tenant or tenant in common with others, it was impossible for him to plead it in abatement. It would have been pleading to a matter which did not appear to be on the face of the proceedings; and there was no way of taking advantage of it,

but upon the evidence offered on the trial; for it was upon the close of the testimony that the fact of his being a joint-tenant appeared. That until the plaintiff's testimony ended, the defendant could not tell but that he might have made out a title to the whole. It was at that stage that he availed himself of the advantage which he conceived that the law gave him of moving for the nonsuit, which he trusted had been very properly ordered.

With respect to the action itself, he said, he was under strong impressions that it could not be maintained by the present plaintiff. In this action, every man must recover according to the strength of his fair title, and if he claims the whole, and only proves himself entitled to a third, fourth or fifth part, he fails in his claim to the premises mentioned in the declaration. He admitted, that if he had claimed as joint-tenant or tenant in common one third or one fourth, he might have recovered his proportion according to the extent of his right, but as he had stated that he was seised in fee of, in, and to the whole of the premises in question, he must therefore recover the whole or none. He next contended, that no judgment could be entered on this record, because the plaintiff did not claim as a joint-tenant or tenant in common, nor could any writ of possession issue to the sheriff, to give him possession of an undivided third part, which had never been designated or laid off.

The Judges observed, that this was a new case in this country, which presented itself for their consideration, as no case had hitherto occurred in which the joint-tenants or tenants in common had not *all* joined in the action, or in which a division or partition of the lands had not been made, so that each individual could prove with sufficient certainty the part or share he was entitled to. In this case, however, the plaintiff sues for the whole, and proves on the trial that he is entitled only to one undivided third. Upon this ground the nonsuit was moved for and granted. As to the regularity of calling for the nonsuit, the judges had no

M'Fadden & wife v. Haley.

doubt about it; as the plaintiff had not stated himself to be either joint-tenant or tenant in common in his writ or declaration, the defendant could not have pleaded in abatement. If such a plea had been put in, it would have been a plea to a matter *dehors* the record. Upon this point, therefore, if the subject matter itself had been a good ground for a nonsuit, it was made at the proper stage of the cause, and could not have been made or taken advantage of in any other way, or at any other time.

As to the action itself, it appears to be a plain and reasonable one, that the plaintiff should recover agreeably to the extent of his right; and if he demanded more than he was entitled to, that was no reason why he should not recover what he had a right to. Every day's experience proves, that in our courts, parties in all kinds of suits are in the constant practice of recovering less than they demand in all personal actions, though they cannot possibly recover more. So, in actions for real property, if a man demand forty acres, he may recover twenty, or any less quantity, according to his right and title. And, in like manner, if a man sue for the half or moiety of a tract of land, he may recover a third, fourth, or sixth part. So also, if *he sue for the whole*, and only prove himself entitled to one third, he may recover that third. The principle seems to be well established in the books. The case of *Abbott* v. *Skinner*, in 1 *Sid.* 229. is strong in point as to the recovery of less than the demand, and the doctrine is confirmed in the case of *Denn* v. *Purvis*, 1 *Burr.* 329.

There is no necessity that the verdict should agree precisely with the declaration. All that is necessary is, that the thing for which the verdict is given should *be comprised in, and form a part of, the thing demanded.* The verdict may be for whatever the party can prove a right to, and the judgment may be so moulded on it as to meet the substantial justice of the case. 3 *Bulst.* 184. And although the sheriff cannot give possession of any particular part, it establishes the right of the party to a share, which,

when divided and laid off, may be delivered to him by the sheriff.

M'Fadden & wife v. Haley.

Rule for setting aside the nonsuit made absolute.

All the Judges present.

Mr. BREVARD gave no opinion, having been concerned for the plaintiff in the case when at the bar.

GEORGE PERRY *against* WILLIAM WALKER.

Columbia, 1802.

TRESPASS to try title to 323 acres of land in *Lancaster* district. Nonsuit ordered. Motion to rescind the order of the circuit court, and to restore the cause on the docket.

The plaintiff produced a grant to one *John Hood*, dated 6th *June*, 1786, for 323 acres of land. It was also proved that *Hood*, the grantee, died intestate some time after the date of the grant, and that his eldest son, *John Hood*, had conveyed 100 acres, part of the above tract, to the plaintiff in this action. That *John Hood*, the son of the grantee, died intestate, leaving three children; so that it came out that plaintiff was only a tenant in common with the children of *John Hood*, the younger, deceased, for 100 acres of land.

At this stage of the cause, the defendant's counsel moved for a nonsuit, as plaintiff by his writ and declaration had demanded the whole of the 323 acres, and had only proved himself a tenant in common in one undivided 100 acres, there never having been any partition or division.

One joint-tenant or tenant in common, who sues for the whole of a tract of land, shall not be nonsuited, but may recover according to the extent of his right. See the foregoing case of *M'Fadden & wife* v. *Haley*.

The presiding judge (BAY) was of opinion, that as there had been no partition or division of the property, and as plaintiff had claimed the whole, and not his third or undi-

Perry v. Walker.

vided interest only, that he could not maintain this suit, and therefore ordered a nonsuit.

This was, therefore, a motion to set aside this nonsuit, which was ordered accordingly, upon the principles and authorities of the next preceding case of *M'Fadden and wife* v. *Haley*.

All the Judges present.

Columbia, 1802.

GEORGE PERRY *against* THOMAS MIDDLETON.

One joint-tenant, &c. who brings his action for the whole of the premises, may notwithstanding recover as far as his right extends. See the foregoing case of *Perry* v. *Walker*; also the case of *M'Fadden & wife* v. *Haley*.

TRESPASS to try title to land in *Lancaster* district. Nonsuit ordered. Motion to set the order aside.

This was another case in which a tenant in common for the one undivided third of a tract of land had brought his suit for the whole, in which Judge BAY had ordered a nonsuit upon the grounds mentioned in the preceding case.

Rule for setting aside the nonsuit made absolute.

All the Judges present.

N. B. The authorities are not given in this or the preceding case, as they both refer to the case of *M'Fadden and wife* v. *Haley*, which may be considered a leading case upon the subject.

CARROLL *against* M'WHORTER. *Columbia, 1802.*

MOTION for a new trial.

In this case a witness for the plaintiff, who was supposed to be interested in the cause, had a release executed and tendered to him, in order to make him a competent witness. After the release was delivered, and the oath administered, it was insisted that he should be confined in his testimony to a particular point in the case, in which, it was said, the materiality of his testimony consisted, and not be examined on any other one; and the presiding judge ruled it so, in consequence of which there was a verdict for defendant.

When a witness supposed to be interested in a cause has a release given him, he is not to be confined to a particular point in which it was stated his materiality consisted, but may be examined generally on every point.

This was a motion for a new trial, on the ground of a mistake of the judge upon the point of law; when, after argument, it was resolved, that whenever a witness was offered by either party, and an objection was made to his competence on the ground of interest, and a release was given him to make him competent, in every such case he is exactly upon the footing of every other witness sworn in a cause, and ought not to be confined to any particular point, but may be examined on every point necessary respecting the merits on either side, and that it had been so ruled in the case of *Luyten* and *Haygood*, in 1798.

Rule for setting aside the verdict, and for a new trial, made absolute.

All the Judges present.

Columbia, 1802.

WILLIAM WRIGHT *against* JOHN GRAY.

Where a man prevails upon a negro boy belonging to another to ride a race, who is killed on the course, he is liable for the value of him, on the ground that wherever one man interposes with or makes use of the property of another without his consent, he is liable for all the consequences in damages.

SPECIAL action on the case for the value of a negro boy. Verdict for plaintiff. Motion for new trial.

Mr. Justice TREZEVANT, who tried this cause at *Edgefield* district, reported, that it had come out in evidence, that the defendant, being concerned in a horse race, had persuaded a negro boy belonging to the plaintiff to ride his horse, without the consent of his master. In the course of the race, the horse threw the boy against a tree, and killed him on the spot. It was for the value of this boy that the suit was brought, and the jury gave a verdict for the plaintiff to the amount of 450 dollars.

The ground upon which this motion was made was, that the master or plaintiff was present on the course, and saw the boy mount the horse, and did not forbid it. This circumstance, it was contended, amounted to a tacit acquiescence on the part of the owner, and debarred him of any right to recover damages against the defendant. It was compared to a loan of a horse, or any other property, for a particular purpose, where the lender, by the act of lending, impliedly agrees to run all the risks attendant on the purposes and designs for which the loan was made. And if the borrower is guilty of no gross neglect, but exercises the ordinary care and diligence in the use and management of the thing loaned, that is, such care and circumspection as men usually observe for the protection of their own property, and an accident happens, the borrower is not liable.

Against the nonsuit, it was urged, that there was a great difference between a voluntary loan for a particular purpose, where the lender has an opportunity of considering and calculating on the chances of the injury the thing lent incurs, and an officious interference with another man's property without his will and consent. In the former case, a borrower is not liable for injuries which happen, where usual

care and diligence are used to protect the property loaned; but in the latter case, the person interfering with another's property, without his will and consent, was liable to all the consequences, and responsible for all damages, the owner may sustain by his presumption.

The Judges, after argument for and against the motion, were unanimously against the new trial, on the ground that a man who officiously presumes to interfere with, or make use of, the property of another without his permission, is liable for all the consequences of such interference, whether he intended any injury to the owner or not.

The plaintiff's seeing the boy mount, and not forbidding it, did not alter the case, and the more especially as defendant might so easily have asked his permission. It does not imply his consent, for he might not have wished to offend a neighbour by what might have been construed into a rude prohibition to the contrary. The plaintiff appears to have been perfectly passive on the subject, while, on the other hand, defendant took every thing on himself. At all events, as the whole case has been fairly before the jury, who have found for the plaintiff, they did not think proper to disturb their verdict.

Rule for a new trial dismissed.

All the Judges present.

Columbia, 1802.

BACOT *against* KEITH.

Where a jury in a very outrageous assault give only one dollar damages, the court will order a new trial; altho' it is not usual or customary to grant new trials on account of the smallness of damages.

ASSAULT. Verdict for plaintiff. Motion for new trial.

From the report of the Judge who tried this cause, (Mr. Justice WATIES,) it appeared that this was a most wicked, cruel and unprovoked assault on the part of the defendant, who had fired a gun at the plaintiff, loaded with buck-shot, which had nearly taken off an arm. And for this injury, the jury had only given him one dollar damages.

This was, therefore, a motion for a new trial, not so much on account of the smallness of the damages, as for the gross and shameful misconduct of the jury, in trifling with the laws of their country *on their oaths*, and with the feeling of the plaintiff himself; as it not only threw all the plaintiff's costs upon himself, but left him without redress for this dreadful outrage committed on his person.

It was urged, that such a verdict was a mere piece of mockery and insult upon the justice of our common country; and if the old doctrine of attaint had not gone into disuse and become obsolete, they would have deserved the punishment annexed to that ancient mode of proceeding for so shameful a verdict.

The Judges were unanimously of opinion, that the jury in this case had behaved most shamefully, and deserved the severest reprehension of the court for such glaring partiality and injustice. And although it was not usual to grant new trials on account of the smallness of damages, yet this was so extraordinary a case, in which every principle of justice had been outraged, that they could not hesitate a moment in ordering a new trial, and *that* without costs.

Rule for a new trial made absolute.

All the Judges present.

WILLIAM HASELL GIBBES *against* WILLIAM BOONE MITCHELL. *Columbia*, 1802.

DEBT on bond. Verdict for plaintiff. Motion for new trial.

All points of law arising in the upper division of the state are to be argued at *Columbia*, and all points of law arising in the lower parts of the state are to be argued at *Charleston*.

This is to be considered as a standing rule in future.

This was a case tried at *Jacksonborough*, in *Colleton* district, and brought up and placed upon the docket or paper of causes for argument at *Columbia*.

Mr. *Simons*, of counsel for plaintiff, moved, that this case should be struck off the docket at *Columbia*, and transferred to the docket of causes in the court of appeals in *Charleston*, on the ground, that as *Colleton* district is on the sea-coast, in the vicinity of *Charleston*, the merits of the motion ought to be argued there and not at *Columbia*.

This case was only important, as the present motion was the means of bringing forward and settling an important point, relative to the administration of justice in this state, which had been frequently agitated, but had still remained undetermined.

It turned upon the construction of the third section of the tenth article of the constitution, which declares, "that at "the conclusion of the circuits, the judges shall meet at "*Columbia*, for the purpose of hearing and determining all "motions for new trials and in arrest of judgment, and all "points of law which shall be submitted to them there; and "that from thence they shall proceed to *Charleston*, to hear "and determine all motions for new trials and in arrest of "judgment, and all law points which might be (in like "manner) submitted to them there."

This article in the constitution, he concluded, evidently contemplated two places in the state for the ultimate and final hearing and determining of all disputes, and to which the citizens of *Carolina*, in the last resort, were to appeal for justice upon the true construction of legal principles. This point, he observed, had repeatedly been before the judges,

Gibbes v. Mitchell.

but no ultimate decision had ever yet taken place, and indeed there had been a great diversity of opinion among the gentlemen of the bar upon the subject; *some* holding they had a right to argue their cases either at *Columbia* or *Charleston*, as they pleased, that it was entirely optional with the party appealing from any decision, to carry such case to either of these tribunals, as he thought proper; *others*, that the article in the constitution, had in view the convenience of the citizens in the upper and lower divisions of the state, and therefore directed and ordained, that there should be two places in the state for the sitting and holding this court of appeals; one at *Columbia*, for the convenience of the suiters in the upper country, and the other at *Charleston*, for the convenience of suiters in the lower division.

Amidst these conflicting opinions of parties and their counsel, causes from the upper extremity of the state, had been carried down to *Charleston*, near three hundred miles, to be argued; and in like manner, causes from the sea-coast had been taken up to *Columbia* for a final determination, which had occasioned much inconvenience, trouble and expense to suitors, and all others concerned in the causes; and what made the trouble and inconvenience the greater, was, that the counsel best acquainted with the nature of the merits, seldom could attend at so great a distance to argue the cases, by which means, new counsel on both sides were to be retained and instructed to the great delay, as well as expense of the suitors on each side of the question. For these reasons, he said, it was high time that some determination should be made on the point, that the citizens might know with certainty where their law cases were to be determined.

Mr. *Falconer*, against the motion, contended, that as the article in the constitution was silent upon the subject, the citizens had a right of taking their causes, or making their appeals from the inferior courts to either of those grand tribunals of appellate jurisdiction, which they thought pro-

per; there was no article in the constitution, he said, to control, or abridge this right or privilege, and therefore the citizens were at perfect liberty to carry them either to *Charleston* or *Columbia*, as they thought proper; and it was not in the power of the judges to refuse to hear any case submitted to them at either place, or to order or direct the party bringing forward the motion, to transfer or argue it elsewhere.

A majority of the Judges, after hearing the arguments, were of opinion, that they had no authority in the smallest degree to abridge the right of appeal, which every man had to the supreme tribunals of justice in our country; but at the same time had no doubt, that they had a right to regulate the mode and manner of bringing forward those appellate cases, in the manner most congenial to the spirit and design of the constitution, and the ease and convenience of the citizens in every part of the state.

It was evident, they observed, that this article in the constitution, creating the court of appellate jurisdiction, had in view the ease and convenience of the inhabitants of the upper and lower divisions of the state, by ordaining that this court should be held in two places for the despatch of business. If this had not been the case, the framers of the constitution, would most unquestionably have directed it to be held in some one fixed place where the best libraries were to be found, and the greatest degree of information upon all legal subjects could be procured; and, however desirable this latter establishment might have been either to the gentlemen of the bar, or even to the judges themselves, they wisely preferred the accommodation of the citizens at large. It was for their benefit and advantage that this arrangement in the administration of justice was originally intended, and it is the duty of the judges to carry this intention into execution as far as it is practicable, and to prevent as much as in their power, the citizens in any case from harassing each other by taking causes from the upper coun-

Gibbes v. Mitchell.

try to *Charleston*, or from the lower part of the country up to *Columbia* for argument, unless by the consent of both parties. They were therefore of opinion, that in future, all the appeal causes in the upper and middle divisions of the state, that is to say, all those arising in the northern, southern, middle and western circuits, should be carried to *Columbia* for argument, as the most convenient and central place for that purpose; and that those arising in the eastern circuit, or lower division of the state, should be taken to *Charleston* for a final hearing and determination, being the most convenient and central position in the lower part of the state; and that this should be a standing rule and regulation for the bringing up of appeal cases to the constitutional court of appeals in future, unless in cases of mutual agreement to argue them either at *Columbia* or *Charleston*, in which case such agreement to be binding on the parties.

It was therefore ordered, that this cause be struck off the docket at *Columbia*, and transferred to the paper of causes for argument at *Charleston*.

Waties, Bay, Johnson, and Brevard, for the motion; Grimke and Trezevant, against it.

MARGARET STOCKTON *against* MARTIN. *Columbia*, 1802.

TROVER for sundry negroes. Verdict for plaintiff. Motion for new trial.

A settlement made by a father on his daughter for life, and after her death to her children, share and share alike, but limited in the *habendum* of the deed to the heirs of her body, deemed too remote, so that the whole rests in the first taker and liable to the husband's debts.

By a deed produced on the trial, it appeared that one *Havens*, the father of the plaintiff, previous to her marriage to Mr. *Stockton*, lately deceased, settled on his daughter the negroes in question during her life, and then to her children *share and share alike*. In the *habendum* of this deed, the negroes were given to Miss *Havens* for life, and then to the heirs of her body; and in the warranty of this deed, he warrants the negroes to his daughter for life, and then to the heirs of her body. After *Stockton's* death, these negroes were seized and sold for his debts, and the defendant *Martin*, at the sheriff's sales became the purchaser. *Stockton* died, leaving several children. This was therefore a suit by Mrs. *Stockton*, the guardian of her children, on behalf of herself and them, to recover back these negroes. And the jury, under the direction of the presiding Judge, gave a verdict for the plaintiff.

This, therefore, was a motion for a new trial, on the ground of the verdict being against law.

Mr. *Nott*, for defendant, in support of the motion, argued, that the limitation over in this case was too remote, and consequently that the property vested in the first taker Mrs. *Stockton*, and as such upon the marriage, it became the property of the husband and liable for his debts.

That the limitation in this case being to the heirs of the body, it created an estate tail of a chattel interest, which had been determined in this court to be too remote, and vested in the first taker, in the case of *Dott* v. *Cunnington*, vol. 1. p. 453. *Riley's* edit. That if any doubt could arise upon

Stockton v. Martin.

the construction of this deed from the premises, the *habendum* and *warranty* had both explained it and put it beyond all doubt, as they both confined the limitation to the heirs of the body only.

For the plaintiff, against the motion, it was admitted, that if there had been no other words in this deed than those contained in the *habendum*, that it would have been an estate tail, and consequently it would have been too remote for the limitation of a chattel; it would have vested in the pretaker, on the authority of the case of *Dott* v. *Cunnington*; but it was contended, that there was a wide difference between that case and the one under consideration. There were no words in the deed in that case, which could be laid hold of, to shew that it was not an estate tail. Every part of it, both the premises and *habendum* limited the property to the heirs of the body, and there was nothing further explanatory of the donor's intention. Whereas, in the present case, it was most evidently the father's intention to make a provision for the daughter for life, and after her death to her children *share and share alike*; that is, to such children as she might have living at the time of her death. This limitation was not too remote, but to persons *in esse* at the time of her death, who could take, and within every rule of law. It was true, that the *habendum* differed from the premises, inasmuch as it was to her during her life, and after her death *to the heirs of her body*; but these latter words, ought in a case like this, where the donor's intention was to make a provision for his daughter, and such children as she might have at her death, to have a liberal construction for the benefit of a young family; and these words, *heirs of the body*, in the *habendum*, ought in conformity to the donor's intention, expressed in the premises of the deed, to be construed to extend to her children; because, "heirs "of the body" here means children, and the words *share and share alike* confine it to those living at the time of her death, and not to indefinite issue. That these words, *share*

and share alike, have always had a very liberal construction given to them when applied to children, both in wills and deeds, whenever it appears to have been the testator's or donor's intention to make provision for a family.

Stockton v. Martin.

The majority of the judges were of opinion, that as the *habendum* of a deed is that part of it which declares and limits the use of the thing conveyed, and as the negroes in question are limited in the *habendum* to the heirs of the body of Mrs. *Stockton*, after her death, it created an estate tail of a chattel, which was too remote, and vested the property in the first taker, Mrs. *Stockton*; consequently, *Stockton* upon his marriage acquired a right to such property, and of course it became liable for his debts. They were therefore of opinion, that the verdict should be set aside, and a new trial granted.

Bay differed in opinion, and agreed with the presiding Judge on the trial, that as this deed would admit of an equitable construction, and was intended as a provision for a young family, it should be construed liberally, and not be trammeled with the rigid rules of law. That if this deed was dissected and examined critically by piecemeal or by fragments, and the latter part was construed to control the former, it might admit of the construction contended for. But if, on the contrary, the premises and *habendum* were taken together with reference to each other, and as explanatory of the donor's intention, he was of opinion, that the limitation over to the children, after the mother's death, was regular and within all the rules of law on that subject, and that the words in the *habendum* might be qualified by the plain and obvious intent and meaning of those in the premises. And this construction would not militate in the smallest degree against the case of *Dott* v. *Cunnington*, where there was not one sentence in any part of the

Stockton v. Martin.

deed to justify the court in giving an equitable construction to it.

Rule for new trial made absolute.

All the Judges present.

Columbia, 1802.

MACKAY *against* REYNOLDS.

A plaintiff in support of his title in an action of trespass, is not confined to one title only, but may rely on as many as he pleases, and if any one bears him out it is sufficient; he may even rely on possession alone, if all the others fail.

TRESPASS to try titles to land, in *Spartanburgh* district. Verdict for defendant. Motion for a new trial.

The land which was the subject of this controversy, was originally the property of *Reynolds* the defendant, who being pressed for money, borrowed it of one *Alexander*, and made him an absolute conveyance of the land; which was to be reconveyed again to him on payment of the sum borrowed. *Alexander* soon after conveyed the land to one *Harrison*, who conveyed it to *Mackay* the plaintiff. The money was afterwards tendered to *Alexander*, who refused to receive it. Shortly after the sale by *Harrison* to *Mackay*, the land was levied on by the sheriff of the district, and sold in consequence of a judgment prior to all the sales and conveyances, at which sale *Mackay* again became the purchaser, and bought in the land a second time, and got the sheriff's deed.

In support of the plaintiff's title, he produced his first deed from *Harrison*, but as some circumstances of fraud were alleged against this deed from *Harrison*, he offered his sheriff's deed in evidence in support of his right; but the presiding Judge (GRIMKE) refused to allow this second deed to be given in evidence, ruling that the plaintiff was bound to rely on one deed or the other, and to make his

election, which he refused to do, on which there was a verdict for defendant.

Mackay v. Reynolds.

This was a motion for a new trial, for misdirection on the part of the judge, and the verdict being against law.

When, after argument, all the other Judges were of opinion, that the verdict should be set aside, and a new trial granted, as a man had a right to offer as many titles to land as he pleased, and should not be restricted to one only; for, if one fails him, the other may bear him out: nay, further, if they should all fail him, he may resort to and depend upon his possessory right alone.

Rule for new trial made absolute.

All the Judges present.

JOHN MITCHELL *ads.* W. H. GIBBES.

Columbia, 1802.

DEBT on bond. Verdict for the plaintiff. Motion for a new trial.

In an action against one obligor on a a joint and several bond, any payment made by the other, if on account of it, may be given in evidence, or fair discounts in right of the other may be set off against it.

The bond on which this suit was brought was a joint and several obligation given by the defendant in this action, and his brother, *W. B. Mitchell.* On the trial several discounts which *W. B. Mitchell* had against this bond were offered in evidence, which, it was urged, were payments on account of, and should be credited on, the bond. But the presiding judge refused to admit them in this suit, as they were not in defendant's own right, but in right of another, who was not a party before the court.

The Judges, after hearing counsel on both sides, were of opinion, that if the discounts were such as were allowed by

Mitchell ads. Gibbes.

our discount act, they ought to have been permitted to have gone to the jury as payments, if they were just and regular, because payment by one joint and several obligor, on account of or in part of the same bond, may be pleaded by the other in a suit against him; otherwise the bond might be paid twice, which would be against law and justice.

Rule for new trial made absolute.

All the Judges present.

Columbia, 1802.

MARY WOODS, Widow of JOSIAH WOODS, and her four Children, *against* The Administrators of JOSIAH WOODS, deceased.

A husband being more than seven years absent from his wife out of the state, and being reported to be dead, will excuse the wife in marrying a second husband, and she shall have her dower or distributive share of her second husband's estate; nor shall any hasty or unguarded expression of her's, in the heat of passion, tend to deprive her of that right, or bastardize her issue.

UPON a writ of partition of lands, under the act of distributions, &c.

To this writ the defendants, who were sons of *Josiah Woods* by a former wife, came in and pleaded *ne unques accouple in loyal matrimony*, and upon issue taken thereon, the claimant, Mrs. *Woods*, proved her marriage to the deceased *Josiah Woods* in 1785, by a magistrate in *Newberry* county, *George Root*, Esq. and that she had lived with him from that time till the day of his death, during which time she had four children by him, who also claimed a distributive share of the deceased's estate.

The defendants, in order to rebut the effect of this marriage before the magistrate, gave in evidence that the claimant, styling herself Mrs. *Woods*, had been married to one *Taylor* in *Virginia*, who, they alleged, was alive when this pretended marriage took place between her and their father; consequently, they contended, that neither she nor her children were entitled to any share or proportion of the deceased's estate.

In reply to this testimony offered by the defendants, it was admitted by Mrs. *Woods* that she had been married to Mr. *Taylor*, a former husband, but she proved that he had gone off and left her soon after the marriage, and gone into remote parts of the western country; that he had been absent for seven or eight years before she married a second time, and that a report had prevailed that he was dead, and died some time before her second marriage, which she verily believed at the time of her second marriage, though no actual proof of the fact was produced.

It also came out in evidence, that after the death of *Josiah Woods*, the intestate, the defendants and the widow quarrelled about the division of the estate; that they had refused to allow her or her children any part thereof; that very high words had passed between them on the occasion, and that she had been heard to say, in the heat of passion and debate, that she would have "all she took with her "when she was *Taylor's* wife, as she supposed they would "not allow her her thirds." She afterwards rendered in an account against them, and called herself *Mary Taylor*. Upon reflection, however, afterwards, she was induced to give up this account, and make her demand regularly for her distributive share of her husband's estate, which she had now done in behalf of herself and children.

The defendants now urged against her claim, that she had herself admitted that she had been married to a former husband, who had gone off to the western country, and who, for aught that appeared on this trial, might be alive at this day. That there was no proof of his being dead, or having been drowned, but a flying report to that purpose, and that common rumour was by no means a sufficient justification of a woman for marrying a second time, without some stronger or better proof of the fact. That she herself had admitted she was *Taylor's* wife since the death of the intestate, *Josiah Woods*, and had rendered in an account against the estate by the name of *Mary Taylor*.

For the demandant it was replied and argued, that she had very candidly admitted that she had been married to a

Woods v. Adm'rs of Woods.

former husband, who had gone off, left, and abandoned her for seven or eight years before she married a second time; that she did not even think of the second marriage until a report was current and generally believed that *Taylor*, her first husband, was dead, having been drowned. This, it was contended, was a sufficient justification to her in taking a second husband. By the law of *England*, if a man or woman is absent seven years from the kingdom, and has all that time been continually abroad, whether the party living in *England* have notice or not, it is a sufficient excuse for marrying a second time, and will exempt the party so marrying from all the consequences of bigamy. So, in like manner, if the parties are absent from each other within the kingdom, and one of them having no notice of the other's being alive at the time, it will be a justification for marrying a second time.

4 *Black.* 164.

The case under consideration was still stronger in favour of the present claimant. Her first husband had left her and gone off into remote parts out of the state in which she was first married, and out of the limits of the state in which she was married a second time, and had been absent more than seven years, nor did it appear that she had ever heard from him during all that time; and what strengthens her case still more is, that it was currently reported and believed that he was dead, having been drowned, and it was not till after this report of his death that she married a second time. This, it was contended, completely removed every circumstance of suspicion or imputation of her misconduct, and left her perfectly at liberty to take a second husband, without imputation either upon her honour, her chastity, or *her marital duties*.

It was further urged on her behalf, that common fame and repute would prove and establish a pedigree, an heir at law to an estate; and, therefore, it ought to be admitted as proof to establish the death of a husband abroad in another country; and unless this kind of proof was admitted, one half of the widows whose husbands died in foreign countries,

and who married a second time, might be deemed prostitutes, and their issue bastardized.

With respect to her own imprudent declarations to the defendants, they were words of heat and passion, expressions used at a time when her resentments had so far got the better of her reason, that she really did not know what she was saying, and, consequently, they ought not to be regarded. As to the account she gave in, that must have been done under an ignorance of her right, and her want of legal knowledge on the subject, which ought not to prejudice her. Under all these circumstances, it was said, that it ill became the defendants to endeavour to make a prostitute of their mother in law, and it became them still less, if possible, to attempt to bastardize four innocent half brothers and sisters, the issue of their father's second marriage.

The presiding judge, (BAY,) in his charge to the jury, told them, that the only point of any difficulty in the present case was, whether the claimant, Mrs. *Woods*, at the time of her second marriage, had good ground to believe her former husband, *Taylor*, dead? If she had, then all her legal rights followed such marriage. That seven years' absence of a husband in another country, without his wife ever hearing from him, was reasonable *ground in law* to presume that he was dead; but when, added to this, a report was current and believed that he was dead, it removed every imputation of improper conduct from her. That general repute and information was, in many instances, as much as could be obtained in a matter of that kind; and as no actual proof was offered in evidence that he was alive, it seemed to be a fair presumption that he was dead. If so, then the second marriage before the magistrate was good and lawful, for it has often been determined "that a marriage before a magistrate "in this country was good," and all her marital rights would follow as a legal consequence of the marriage.

As to the loose declarations of the widow, when she was enraged at being about to be turned out of house and home without a shilling, and her four young children at her back, he thought that the jury should pay no attention to them,

Woods v. Adm'rs of Woods.

they appearing to have been words of passion uttered without a knowledge of her right, which ought not to prejudice her or her innocent children; and so with regard to the account rendered, for if she pretended to make an illegal demand upon the administrators, it was no reason why she should be debarred of her just claim.

The jury, however, contrary to the opinion of the judge, found a verdict against her.

This was a motion for a new trial.

The Judges, after argument, were unanimously of opinion, that the presumption of law, from the length of time the first husband had been absent without her ever hearing from him, and the report of his death, were strongly in her favour. That the presumption of law in support of marital rights was much more favoured than a presumption against them, especially when such unfavourable presumption went to bastardize the issue of a marriage, apparently legal and proper.

Rule for new trial made absolute.

All the Judges present.

N. B. On the second trial there was a verdict in favour of the claimants, in consequence of which she and her children had a distributive share of the deceased's estate apportioned off to them.

Administrators of JOHN COMPTY, deceased, *against* MARTYN ALKEN.

Columbia, 1802.

DEBT on bond, 1,000*l.* Verdict for plaintiffs. Motion for new trial.

This action was brought upon a bond given by defendant to plaintiffs' intestate. Defendant pleaded the general issue, and gave notice that he meant to offer in discount, a bond assigned him by *William Cunnington*, for a sum equal in amount to the amount of the bond sued for, viz. 1,000*l.* given by the intestate in his life-time to the said *William Cunnington*.

Upon the trial, this bond from *Compty* to *Cunnington* was produced, with a regular assignment to *Alken*, the defendant in this case.

To this bond, however, the plaintiffs objected, alleging that it had been paid off; and for that purpose, offered a receipt to the full amount of the bond offered in discount, to the following effect: "Received *May* the 20th, 1794, of "*John Compty*, sundry goods by *Richard Bolan*, to the "amount of 200*l.* also some time before, a note of *Cornelius* "*Vanderhorne*, for 600*l.* also an order on *John Rutledge*, "for 200*l.* which I shall be accountable for.

(Signed,) "*William Cunnington.*"

Where a bond assigned to defendant, was offered in discount against one given by him to the plaintiffs' intestate, a receipt is good evidence to shew that the assigned bond had been paid off. A receipt or acquittance of any kind, is not barred by the statute of limitations, as it is an extinguishment of the debt *pro tanto*, and ought not to be assimilated to open account.

Mr. *Falconer*, for defendant, contended, that this receipt not being on the bond, nor specifying on what account these goods and the note and order were delivered to *Cunnington*, they could not be considered in any other light than as an open account against *Cunnington*, and as such, the whole was barred by the statute of limitations. For that purpose he quoted *Espinasse's N. P.* 239. where it is laid down, that a debt barred by the statute of limitations, could not be admitted in discount, and the plaintiff might

Admr's of Compty v. Alken.

object to it on the general issue. That although *Alken* was not plaintiff in this action, yet as this receipt went to destroy his discount, he ought to be considered as standing in the shoes of a plaintiff, in rebutting any discount set up against the bond he offered in evidence against the present plaintiffs' claim.

He next contended, that a discount could not be set off against a discount. That the act never contemplated any such kind of transactions, only mutual demands between the parties litigant.

In reply to this, it was urged on the part of the plaintiffs, that this receipt was evidence of payments made to the amount of the bond offered in discount, and was to be considered as made for the express purpose of satisfying this bond, as no transaction whatever appeared between the deceased in his life-time, and *Cunnington*, who assigned this bond, excepting the one under consideration. It was admitted that the statute of limitations would bar open accounts, but that the statute never could run against payments, or discharges *given by a man who has a demand against another.*

The presiding Judge, (BAY,) in his charge to the jury, told them, that there was a great difference between open accounts and discharges or acquittances. The former as well as notes of hand, might be barred by the statute of limitations, but that act could never operate against a release or acquittance, because so much as was mentioned in a release or a discharge was an extinguishment of the debt or demand *pro tanto.* That every receipt was a release in law, and extinguished a debt or demand as effectually as a release under hand and seal. That in the present case, the receipt was for the whole amount of the bond, and as it did not appear, that there were any other transactions between the parties, it was fair to presume that the sums mentioned in the receipt produced, were paid in discharge of the bond

offered in discount. And that if the jury should be of his opinion, and there was nothing to justify a contrary one, it would be their duty to reject the bond offered in discount, as having been paid off and discharged.

That this could not be considered as a discount against a discount, which would be an absurdity, but evidence of payment of a debt offered in discount, for it had been frequently determined that a *bona fide* debt transferred to a defendant, might be set off against a plaintiff's demand. That it was, therefore, surely consistent with every principle of law and justice, for the plaintiff, if he could shew that the debt assigned was paid off by him, to give evidence to rebut the defendant's discount offered against him.

The Jury, agreeably to the Judge's charge, found a verdict for the plaintiffs, and rejected *in toto* the defendant's discount.

This was a motion for a new trial, on the ground of misdirection, and the verdict being against law.

When, after argument, the Judges refused the motion and ordered the rule to be discharged, holding, that a receipt or acquittance of any kind, was not within the intent or meaning of the statute of limitations, and that the construction given by the presiding Judge in his charge to the jury, was perfectly consistent with the rules of law.

Present, GRIMKE, WATIES, BAY, JOHNSON, and TREZEVANT.

BREVARD absent at the time of the argument.

CASES

ARGUED AND DETERMINED

IN THE

CONSTITUTIONAL COURT OF APPEALS,

OF THE

STATE OF SOUTH CAROLINA,

IN THE YEAR 1803.

Columbia, 1803.

JOHN HOPKINS *against* JOSHUA ALBERTSON.

Where all the witnesses to a will, in order to pass lands are dead, or out of the state, the hand writings, or signatures of all the three witnesses to its execution should be proved.

TRESPASS to try title to land in *Chester* District. Verdict for plaintiff. Motion for new trial.

In this case the brief stated that the plaintiff claimed under a devise from his father, *John Hopkins*, deceased. The will was produced, but all the subscribing witnesses were dead. The hand-writings of two of them were proved by a witness produced, but the signature of the third either was not, or could not be proved. Upon this proof, however, the presiding Judge (BREVARD) thought proper to send the cause to the jury, who found a verdict for the plaintiff.

This was, therefore, a motion to set aside this verdict on the ground of misdirection, and as being against law.

When, after hearing counsel in support of the motion, the court was of opinion that there should be a new trial. As the statute expressly requires, that there should be three witnesses to every will to pass lands; consequently, they should be produced, if alive, or within the jurisdiction of the court; if not, then their hand-writings should be proved; for if only the hand-writings of two of them are proved, it does not come up to the meaning and intent of the statute; for the name of the third witness, for aught that appears to the court, may have been forged; in which case, it would only be witnessed by two witnesses, which is not an *execution* of a will according to the requisitions of the statute, which requires three witnesses; though one credible witness may prove the signatures of all the three witnesses, as was determined in the case of *Hopkins* and *De Graffenreid.*

See this case, *ante*, p. 441.

Rule for new trial made absolute.

Present, WATIES, BAY, JOHNSON, TREZEVANT, and BREVARD.

Columbia, 1813.

MATHEW COLEMAN *ads.* The Guardian of a free Negro named BEN.

MOTION for a new trial, in a case tried in *Camden*, and verdict for plaintiff.

An exemplification of a judgment of a court in *Virginia*, sufficient to establish the freedom of a negro in this state.

This case was tried before Mr. Justice JOHNSON, at *Camden*, in the District of *Kershaw*, in order to try the freedom of the plaintiff's ward, a negro named *Ben*. On the

This court is not to examine into the regularities of proceedings of a sister state, although they may at first appear to be irregular; but are bound to presume they are regular and proper, agreeable to the laws of the state from whence they are transmitted.

Two years time enough to procure testimony from the state of *Virginia*, or even less, if due diligence had been used for that purpose.

Coleman ads. Guardian of Negro Ben.

trial, a record of a judgment from the state of *Virginia* was produced, by which it appeared that the negro *Ben* had established his right to his freedom in that state. To this record an exception was taken on the ground of irregularity apparent on the face of it, because it appeared that the suit had originated in a county court, and it did not state that any judgment had ever been given in the case by that court. But that a judgment had been given by a superior court, which had not the original cognisance of the cause, which, it was contended, was such a repugnancy on the face of the record itself, as destroyed it. But the presiding Judge overruled the exception, on the ground that the laws of the state of *Virginia* permitted causes to originate in the inferior county courts, and afterwards to be taken up by a *certiorari* or other legal process to the superior courts, for trial and final determination.

Two other exceptions were then taken; first, as to the identity of the negro; and, secondly, because the defendant was hurried into a trial before he could get his witnesses to attend from *Virginia*.

One or two witnesses were then examined, who proved, that to the best of their knowledge and belief, they had seen this negro in *Virginia;* that he had there passed for a free man; and that they believed him to be the identical negro, which was said to be free in *Virginia;* upon this evidence the jury found for the plaintiff.

The present was, therefore, a motion for a new trial, on the ground of mistake in the Judge on the law, and also for defect of evidence to the jury, and also upon the other ground that the defendant was hurried into a trial before he could procure his testimony from *Virginia*, to shew his right of property in the negro in question, and that he was not the negro named in this record.

After hearing arguments, the court was against the new trial; that it was not for the Judges of one state to sit in judgment to determine on the regularities or irregularities of the judgments and proceedings of the courts of justice

Coleman ads. Guardian of Negro Ben.

in a sister state, and although they had not the laws of *Virginia* before them, yet it was fair and regular to presume that the record and judgment were agreeable to the laws and the usual course of proceedings in that state; and as such, they were bound to give due faith and credit to them, and the more especially as the exemplification of the judgment appears to be in due form, agreeable to the act of congress.

As to the second objection, respecting the identity of the negro *Ben*, that was a matter of fact for the jury, of which they were the constitutional judges.

And as to the last ground, that of being prematurely hurried on to a trial; from the inspection of the proceedings in this case, it appears, that the cause had been depending nearly two years, which surely was more than sufficient time for the defendant to procure his testimony from the state of *Virginia*, if he had used due diligence.

Rule for new trial discharged.

All the Judges present.

LOVICK ROCHELL *ads.* JAMES HOLMES.

Columbia, 1803.

TRESPASS to try title to lands in *Kershaw* District. Verdict for plaintiff. Motion for new trial.

A copy of a grant from the records certified by the secretary of state, &c. is sufficient evidence to shew that the original grant once existed; and length of time and the ravages of the war, are strong grounds to raise a presumption of its loss or destruction.

In this case the plaintiff claimed under an old grant to his grandfather for the land in dispute; but as he had not the

A possessory right under the statute, so as to defeat a prior title, is never to be presumed, but must be clearly proved and shewn.

A person who was a minor at the time of the death of his ancestor, has five years after he comes of age to bring his action for recovery of his lands.

Rochell ads. Holmes.

original grant to produce, he offered a copy of it from the records, as presumptive evidence that the original once existed; and as to the loss of it, he submitted the great length of time which had elapsed since the date of the grant in the year 1763, and the ravages of the war as circumstances presumptive of its loss or destruction, which presumptions were permitted by the presiding Judge to go to the jury as evidence of the existence and loss of the original grant.

The plaintiff then proved, that his father was the reputed heir at law of his grandfather, and that he had been in possession of the land five years before the 1st of *January*, 1775, so that, he contended, he had proved a double right in his father, to wit, that of descent as heir at law of the grantee, and a possessory right under the statute of limitations; and it was not denied but that he was the heir at law of his father. He next proved, that the defendant had entered the land without any title, and that he had commenced his action before he was twenty-six years of age.

Upon this testimony the jury found a verdict for the plaintiff. This was a motion for a new trial on several grounds taken by defendant's counsel.

1st. That the presiding Judge was mistaken in the law, by permitting defective evidence to go to the jury, to prove the existence and loss of the original grant.

2dly. That it did not appear, but that the defendant might have gained a possessory right to the land in the lifetime of the plaintiff's father; and if so, then his right of taking by descent from his father, was cut off by the statute of limitations; and

3dly. That even admitting that his right of descent was not cut off, he had not brought his action within two years after he came of age, agreeable to the terms of the limitation act.

To these objections it was answered, on behalf of the plaintiff, on the first ground, that the existence and loss of

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the original grant was not well susceptible of higher proof than had been offered on the present occasion, that the grandfather and father of the plaintiff were both dead, as well as most, if not all their contemporaries; so that it was not possible to produce the testimony of living witnesses to the existence and loss of the original grant; and to supply these defects, there could not be higher evidence than had been offered. The copy of the grant from the old original records was surely the next best evidence which could be offered of the existence of the original; as no instance ever was known of any grant having been recorded or entered on the record books, which had not passed under the great seal; and it was well known that it was anciently one of the conditions in every grant, that they should be recorded, in order that the old quit-rents might be the more easily recovered from every grantee or holder of lands: besides, the secretary of state was a sworn officer of high trust, and it was not to be presumed at this distant day, that he could be guilty of a fraud in recording a fictitious grant which had never been in existence; and as a corroborating proof of the fact, the boundaries, lines, and corners, upon resurvey, all correspond with the copy of the plat and grant now produced; and as to the loss of it, it was difficult for the plaintiff to do more than to say he had it not to produce; and it was not to be supposed in the nature and reason of things, that he would, or could be instrumental, in destroying or concealing so important a document in favour of his own claim, and upon which his right was founded. The plain inference therefore is, that in the long course of years, and during the ravages of a destructive war, in which so many of the citizens of this country lost their deeds and valuable papers, it must have been lost or destroyed, by time or accident; for all which reasons, it was argued, that the presiding Judge decided legally and properly, in permitting this kind of strong presumptive evidence, both as to the existence and loss of the original grant, to go to the Jury.

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With respect to the second objection, it was contended that the plaintiff might make his election either by claiming by descent from his grandfather down through his father by the rules of the common law, or he might rely upon the possessory right of his father, under the act of assembly, which declares that five years' possession of lands before the 1st *January*, 1775, shall be a good and valid title against all the world. Either was sufficient to give his father a right and title to the land. Admitting, then, that the title of the land was legally vested in his father on the 1st day of *January*, 1775, the statute of limitations was suspended from time to time from that day, and did not run out or go into full operation, till *November*, 1791. It was incumbent, therefore, for defendant to shew that he had entered on the land after the 1st *January*, 1775, and possessed it till *November*, 1791, or that he had possessed it after the latter period for five years before he could gain a title by possession, which he has not done. He has failed, therefore, in shewing that he had defeated the right of the plaintiff's father in his life-time, by an adverse possession, so as to cut off or destroy the right of the present plaintiff, by descent from his father.

As to the third and last ground of the objection taken by defendant, it was urged that it must fail as well as the two preceding ones, for this action was commenced by the plaintiff before he was twenty-six years of age, and although the act of limitations passed in 1712, allowed persons under twenty-one years, only two years after they came of age, to commence their suits for recovering of lands; yet the act of *February*, 1788, enlarged the time, and allows minors five years after they come of age to commence actions for recovery of lands, so that the plaintiff is clearly within the act in bringing his action.

Pub. Laws, 455.

The Judges were all clearly of opinion, after hearing the arguments, that the right was with the plaintiff on all the grounds, and that the defendant was not entitled to a new trial.

Rochell ads. Holmes.

On the first ground, they said, the presiding Judge was perfectly correct in suffering the copy of the grant from the records in the secretary's office, to go to the Jury as presumptive evidence that it once existed, under the circumstances, and for the strong reasons urged by plaintiff's counsel, in the course of the argument, especially as it was strongly confirmed and corroborated by the plat and resurvey lately made, which ascertained the old boundaries; and that length of time, and the ravages of the war, were circumstances sufficiently strong, to raise a presumption of its loss or destruction.

That as the plaintiff's father had clearly made out a good title in himself down to the first day of *January*, 1775, it was incumbent on the defendant to shew, that that title had been defeated by an adverse possession, agreeable to the statute of limitations, during the father's life-time. This title by possession so as to defeat a grant, or other legal conveyance, is never to be presumed; but must be actually proved and shewn, in order to rebut a prior title, in the same manner, and with the same degree of precision, as plaintiff must shew a clear title in him, before he can recover.

On the third and last ground, it was evident that the time allowed to minors to bring actions for recovery of lands, had been enlarged from two to five years after they came of age, by the act of *February*, 1788; and as this suit was brought by the plaintiff before he was twenty-six years of age, it was well brought.

Rule for new trial discharged.

All the Judges present.

Columbia, 1803.

ANTHONY SWEET *ads.* JOSHUA AVAUNT and Wife.

Newspaper advertisements not proper to be sent to a jury, unless in cases of libels, or the publication of some notice under some of the acts of the legislature or the like.

TROVER for six negroes, tried in *Marion* district. Verdict for plaintiff. Motion for new trial.

On the trial of this cause, the presiding Judge permitted an advertisement in a *George Town* newspaper, to be read in evidence to the Jury, in support of the plaintiff's claim. And it was upon this ground, that the motion for the new trial was made.

The court was of opinion, after hearing the case stated, that this kind of testimony was improper to be given to a Jury; as there was no telling what influence it might have upon their minds; and, therefore, it ought to be excluded entirely, unless to prove a notice, under some of our acts of assembly; or, for publishing a libel, or the like. Therefore, a new trial was ordered, but without costs.

All the Judges present.

Charleston, 1803.

WILLIAM PURVIS *against* TUNNO & PRICE.

Where a vessel by accident, or otherwise proves leaky and unfit for sea, while taking in her cargo before she breaks ground on her voyage, it will justify the freighter in taking out the goods and shipping them on board another vessel. They are not bound to wait until she is repaired.

SPECIAL action on the case, upon a contract for the freightment of a brig from *Charleston* to *Cowes* and a market. Verdict for defendants. Motion for a new trial.

In this case it appeared, that defendants had chartered a brig from the plaintiff, on the voyage above mentioned; that

about 1,200 boxes of sugar, and 10 tons of logwood, were put on board of her while she lay in the dock; but she then began to draw more water than the dock conveniently afforded, in consequence of which the captain removed her out to the end of the wharf, where there was deeper water, in order to take in the remainder of her loading. While laying at the end of the wharf, she grounded, and by that means started the butt ends of several of the planks of her bottom, and became so leaky that they were obliged to land that part of the cargo which had been put on board of her, and to put her into the hands of a ship carpenter to be repaired. The freighters, the defendants, however, in the mean time, conceiving they had a right to be off their contract on account of this accident, and that they were not obliged to wait till she was repaired, chartered another vessel, and sent forward the cargo they had ready, to a market. The jury under the charge and direction of the presiding Judge, (TREZEVANT,) after hearing the evidence, gave a verdict for the defendants. And the present was a motion for a new trial, for misdirection on the part of the Judge, and because the plaintiff alleged the verdict was against law.

The grounds on which plaintiff relied for a new trial, were the following. 1st. Because the accident which happened to the brig was not sufficient to warrant a decision of the contract; inasmuch as the defendants had their remedy in their own hands, and had a right to pay themselves out of the freight, any damages which might be occasioned by the delay in repairing the vessel. 2d. That the brig had just been thoroughly repaired, and the planks put on her bottom were two inches thicker than usual, with a view to guard against damages by her taking the ground; so that there was no neglect or omission on the part of the plaintiff; it was a reparable accident, and defendants should have waited a reasonable time, till she was repaired. 3d. That the captain was, *pro hac vice*, the agent of the freighters; and they ought to be answerable for any misconduct

Purvis v. Tunno and Price.

on his part, in moving the brig out to a place which was more hazardous than the dock, where the first part of the cargo was taken in.

For defendants it was contended, that by the Marine Law it was obligatory on the part of the owners, not only to see that a ship was stout and staunch, and in all respects fit for sea, before any part of the cargo was put on board, but that she should be kept in like good order by them, until she broke ground to proceed on her voyage. That if a vessel becomes leaky or unfit for sea, after she sets sail, the shippers are obliged to wait a reasonable time till she is repaired at any intermediate port where she may call for that purpose, unless another vessel is prepared to carry on the cargo to the port of destination. But in a case like the present one, where their goods were obliged to be put on shore, on account of an accident which happened before the voyage commenced, they were not obliged to lose the chance of a good market abroad, and wait till she was again made seaworthy, when they had an opportunity of procuring another vessel without delay, to send on their merchandise to a foreign market. That as to the power of paying themselves out of the freight, the amount of any damages they might sustain by the delay, and probably the loss of a good sale abroad, it was easy to foresee that it would be subjecting themselves to a contest or lawsuit in a foreign country, where it might be extremely difficult to ascertain and fix those damages with any degree of certainty; and even if it was practicable, it was always attended with trouble and delay, together with much vexation and costs. That as to the captain being their exclusive agent, during the time of taking in that part of the cargo which had been put on board, they denied the principle in the manner contended for by the plaintiff, but admitted it in a qualified degree. As far as related to the care of the goods, and the proper stowing away on board the ship, they admitted he was their agent; but in every thing

relating to the ship, her tackle, apparel and furniture, &c. he was the agent of the owners.

Purvis v. Tunno and Price.

The court, after hearing the arguments, refused to grant the new trial; as they were of opinion the law was with the defendants on all the grounds.

Rule for new trial discharged.

Desaussure, for plaintiff. *Pringle*, for defendants.

All the Judges present.

ANDERSON, BANNALINE & Co. *against* ROBSON & JONES.

Charleston, 1803.

THIS was an action on the case upon a bill of exchange, the original of which was supposed to have been lost.—Verdict for the plaintiffs. Motion for new trial.

A merchant forwarding to his agent abroad a duplicate letter enclosing a notarial copy of a bill of exchange, and referring to the original letter and bill on board of a particular vessel; proof of the letter-bag of such vessel having been thrown overboard when chased by an enemy, will be sufficient evidence of the loss of the original, so as to justify the court to permit a copy to be given in evidence to a jury.

The bill in question was drawn by the defendants, merchants in *Glasgow*, in favour of the plaintiffs, who were also merchants in that city; but as they both lived at the same place, it was a single bill, without duplicate or triplicate, as is customary where bills are drawn by merchants on others abroad. It was refused payment by the payee, and was of course duly protested both for non-acceptance, and non-payment. But in the mean time, and before the bill was at maturity, Mr. *Robson*, the only solvent copartner, came out to *Carolina*; and the bill after it was protested, was sent out after him for recovery. The letter enclosing the original bill with the protests, was put into the letter-bag of the ship *Britannia*, bound to *Charleston*, which on the passage was chaced by a *French* privateer, and that so closely, that the master was induced to throw the letter-bag overboard, for fear of its falling into the enemy's

Anderson, Hannaline & Co. v. Robson and Jones.

hands, in which, it was alleged, the bill in question had been put.

One witness proved, that the defendant *Robson* acknowledged in *Charleston*, that he had drawn the original bill, on which this action was brought, *but there was no positive proof of its loss.* In order, therefore, to supply this defect of positive proof, the plaintiffs resorted to presumptive evidence; and the plaintiffs' correspondent in *Charleston*, to whom the originals had been addressed, swore that he had been employed by the plaintiffs' house in *Glasgow*, to recover the amount of this bill; and that he had received by the next ship which sailed from *Glasgow* after the sailing of the *Britannia*, a duplicate of the letter written by that ship, from the plaintiffs, enclosing notarial copies of the protests, with a copy also of the original bill; in which they informed him, they had sent on the originals by the *Britannia;* he also proved that the *Britannia* arrived without any letters, and that the captain and mate of the ship had both assigned as a reason for not bringing letters for *Charleston*, that the letter-bag had been thrown overboard, when the ship was chaced by the *French* privateer, on the passage.

An objection was taken to this kind of testimony by the defendants' counsel, as not bringing this case within the rules of law; as there was no other proof of the original being put on board the *Britannia* but the plaintiffs' own letter; and the throwing the letter-bag overboard, containing the originals, was only hearsay testimony.

To this it was replied by the counsel for plaintiffs, that from the nature of the transaction itself, the matter was not well capable of higher proof; and in mercantile affairs, in the course of trade between merchant and merchant in foreign countries, less strictness was observed, and a much greater latitude was allowed, than in the contracts made, and to be observed between citizen and citizen residing in the same country. That every thing had been proved in this case, which was usual and customary in the way of

trade. Letters of advice, invoices, bills of lading, protests, and all those kinds of documents, usual in commercial cases, were every day given in evidence to juries, and admitted by courts of justice; and without it, trade could never be conveniently carried on. The duplicate of the letter, enclosing notarial copies of the protests, and the bill of exchange, could not possibly be a fabrication, as it was written soon after the sailing of the *Britannia*, and as there was but one original bill, a duplicate or triplicate could not be sent. Every thing, therefore, seems to have been done by the plaintiffs in this case, which it was incumbent on them to do, in order to establish their right; and the fact of the letter-bag being thrown overboard when the ship was chased by the *French* privateer, was unquestionably proved and corroborated by the actual arrival of that ship in *Charleston*, without letters; and the declaration of the principal officers of the ship to that effect, on their arrival, who could have had no interest in making a wilful misrepresentation upon a point of so much importance to all concerned, and in which their own characters as honest men were deeply concerned.

Judge JOHNSON, who tried this cause, in his charge to the jury, observed, that this was a case to be governed more by the usage and course of trade, than by the rigid rules of the common law; and much greater latitude was allowable in a case of this nature, than could be permitted by the courts of justice, in cases relating to the loss of deeds, specialties, and other instruments, which were to be regulated by the strict rules of evidence.

That there appeared to be no doubt, as to the existence and contents of the bill. The only point for the consideration of the jury was as to its loss; and he left it to them to determine, upon the whole of the circumstances of this case, whether the loss of the bill had been satisfactorily accounted for, or not?

Anderson, Bannaline & Co. v. Robson and Jones.

And the jury being fully satisfied upon all the points of the case, found upon the copy of the bill and protests, under the notarial seal in *Glasgow*, the amount of the bill with interest and costs.

The present was, therefore, a motion for a new trial, on the grounds that the verdict was without evidence and against law, &c.

The court, after hearing arguments on both sides, was of opinion, that the case was very properly submitted, under all the circumstances of the case, by the presiding judge to the jury, who had found a verdict for the plaintiffs; and as the *loss of the original bill* was a matter for their consideration, arising from the nature of the evidence offered, and the whole of the case together, the court did not think proper to disturb the verdict.

Rule for new trial discharged.

Turnbull, for plaintiffs. *Cheves*, for defendants.

All the Judges present.

Charleston, 1803.

VANDERHORST & Co. *against* DAVID M'TAGGART.

Rice or any other staple commodity of *Carolina*, should be examined at the shipping port, before it is put on board. Its quality is not to be determined by an examination at a foreign port. The neglect on the part of the purchaser to make such examination, is a tacit admission of the merchantable quality of the article, and he thereby takes the risk upon himself.

ASSUMPSIT for a quantity of rice sold by plaintiffs as factors.

The rice in question had been sent down to the plaintiffs for sale, by Mr. *Bowman*, from his plantation on *Santee* river. The defendant purchased it, and there was a balance of 84*l.* 17*s.* 10*d.* unpaid, for which this suit was brought.

The defence was, that the rice was damaged and not merchantable; and, therefore, that defendant was not bound

to pay. On the part of defendant it was proved, that fifteen tierces of it had been shipped by him to *Alexandria* in *Virginia*; that the vessel had only eight days passage; that the weather was very fine, the vessel staunch and airy, and that no damage could have happened during the passage. That upon the examination of the rice after it was landed at *Alexandria*, the whole of it in the casks was found to be dark, musty, and unmerchantable; so that a purchaser who had bought it as merchantable returned it to the consignee, who was obliged to sell it at public auction as damaged rice, when it brought little or nothing; so that the damages upon such sale amounted to a sum considerably above the balance claimed by the plaintiffs in the present action.

For the plaintiffs, in reply, it was proved by the person who managed Mr. *Bowman's* plantation, that these fifteen casks of rice had only been beaten out ten days before the sale to defendant, and that it was put up in good merchantable order. The master of the schooner who brought it to *Charleston* from *Santee*, proved that it was delivered dry and in good order. And Mr. *Mitchell*, the cooper, who had coopered all the casks after their arrival in *Charleston*, proved that they were all in good order. And the wharfinger, a Mr. *Keating*, shewed the rice to defendant when he purchased it. And Mr. *M'Taggart* was so well satisfied with it, that he had only two casks opened, when he immediately went to the plaintiffs' counting-house, and made the purchase without further examination; and further, that all the parcel appeared to him to be in fine order for shipping. All the witnesses stood fair on both sides, and the only difficulty was to account for the damage which the rice had sustained.

The case was submitted by the presiding Judge to the jury, as a matter for their consideration, and they found a verdict for the defendant.

After this verdict was given in, this was thought to be a cause of more importance than at first it was considered to

Vanderhorst & Co. v. M'Taggart.

be, as affecting both the planting and shipping interests of this country.

Accordingly a new trial was moved for, on the ground of its being a new case of much importance, and meriting a fuller consideration, than it had undergone on the above trial.

On the part of defendant it was contended, that the credit and interest of *Carolina* very much depended upon the integrity and good conduct of the planters, in putting up their staple commodities in good order for a market; particularly rice, which was so easily damaged. That merchants and strangers reposed a high confidence in their honour, and advanced their money freely, upon the faith and credit which was given to their care and circumspection, in putting up this valuable article dry and in a good condition for shipping off to a foreign market; and if at any time it turned out otherwise, they, and not the merchant or purchaser, should bear the loss. That receiving a sound price, warranted a sound commodity, and if the article sold turned out unsound, the seller should return the price, and all damages besides.

In the present case, it was said, it was almost impossible that the rice could have been damaged or injured after it came into the defendant's possession; as the vessel was a fine dry airy one, had met with no bad weather, and was only eight days on the passage, so that it was fair to conclude that the rice must have been in a damp or moist condition, when it was put into the casks at Mr. *Bowman's* plantation; or received some injury afterwards, before it was shipped for *Alexandria*. That this presumption was so strongly inferable, that it was difficult to draw any other conclusion.

For the plaintiffs, in reply, it was admitted, that the interest and credit of the country did depend a good deal on the care and circumspection of the planters in putting up their staple commodities in good and merchantable order for shipping off to a foreign market, and par-

ticularly rice, and that if it turned out otherwise, the planters ought to bear the loss; but they contended, notwithstanding all that had been said to the contrary, that the rice did, in this case, come to *Charleston* in good order, and was delivered in good order; and that the evidence adduced on the part of the plaintiffs was clear and explicit on this subject.

That it was the duty of the defendant to have examined it before he shipped it; and it was every day's practice for purchasers of rice to do so; that there were coopers of skill and judgment on every wharf in the city, whose duty and busines it was to make such examination, and to put the casks in good order, before they were shipped; and it was the defendant's own fault that this was not done, and he has himself to blame for not having it examined before he shipped for *Alexandria*. But the plaintiffs' counsel insisted that the great evil of the principle contended for by the defendant, consisted in making the examination or inspection of the condition and quality of rice at a foreign port; and setting up that as the rule, by which its soundness was to be tested, instead of making such examination at the place where it was shipped.

That flour, and all the great staple articles sent abroad from the northern, or other states, were all inspected at the port of delivery before shipping; and so ought the rice of *Carolina* in like manner to be examined before it was shipped.

That a contrary principle, if it was ever introduced into this country, would place the *Carolina* planters at the mercy of the shippers and ship-masters, and their correspondents abroad in other countries, for which reasons it ought to be laid down as a general and governing rule in all cases, that the staple commodities of this country should be examined here before they were shipped, otherwise to be taken at the risk of the shipper.

Vanderhorst & Co. v. M'Taggart.

The Judges, after duly considering this motion, observed, that in a case like the present one, where the scales of evidence were so equally poised, it was difficult, if not impossible, to say which side ought to preponderate, without doing manifest injustice to the other, upon the ground of evidence. But by resorting to principles, they thought they were justifiable in directing a new trial, in order that this case should have a fuller investigation.

That the principle contended for on behalf of the plaintiff, was a wise and beneficial one, both to the commercial and planting interests of *Carolina*, namely, that the staple commodities of the country should be examined or inspected before shipping, by which means the credit of the planters raising those articles would be kept up and maintained, and frauds upon purchasers would be prevented; which practice was not only warranted by the usage of trade in this port, but also by the general custom in most of the other parts of the world. Secondly, that where it was usual to examine rice or any other staple article before shipping, and the purchaser refused or neglected to take that precaution, he thereby tacitly admits the quality to be good, and takes the risk upon himself. And, lastly, that the inconveniences to commerce in general would be less by observing those rules, than by following the mode pursued in the present case, of examination at the port of delivery, where only one of the parties, or his agent, was present at the examination; and that, too, after every expense had been incurred in sending it on to a foreign market.

For these reasons, and in order that these points, which were of general concern, might be more fully argued and investigated, the rule for new trial was made absolute.

Dessaussure, for plaintiffs. *Pringle*, for defendant.

All the Judges present.

Vanderhorst & Co. v. M'Taggart.

N. B. All these points were again very fully and ably argued on the second trial, when there was a verdict for the plaintiffs for the full amount of their demand, on the ground that it was the defendant's own fault that the rice had not been fully examined before it was shipped, and that by such neglect he admitted the quality of the rice to be merchantable and in good order at the time of shipping, as it was proved that he had only two casks opened, and that he was so well satisfied with them, that he went without further examination and made the purchase of the whole.

JAMES WALLACE & Co. *against* DEPAU & KERN.

Charleston, 1803.

CASE on a policy of insurance. Verdict for plaintiffs. Motion for a new trial.

Where a vessel proves leaky and unfit for sea, the day after she sails, without any violent gale of wind to make her so, it is strongly presumptive she was not seaworthy, when she sailed.

This was an action on a policy on goods shipped at *Savannah* in *Georgia*, to *Savannah Le Mar* in *Jamaica*, on board the schooner *Thomas*.

From the captain's protest produced on the trial, it appeared that the vessel sailed from *Savannah* on the 24th of *April*, 1799; that on the following day she proved leaky, which continued to increase till the 27th, when they were obliged to bear away for *Nassau* in *New Providence*. That after they had borne away for *Nassau*, they met with severe gales of wind, and on the 8th *May* arrived at *New Providence*, with two feet water in the hold, where she was examined, and condemned as unfit for sea, and the cargo sold for little or nothing.

The defence set up by defendants was, that she was not seaworthy at the time of sailing, which was sufficient to vitiate the policy of insurance. That it was very evident there must have been some radical defect in the bottom of the vessel, as the leak commenced on the day after she went over the bar, and continued to increase till the 27th; during

James Wallace & Co. v. Depau and Kern.

which time, there was fine weather, so that it could not be attributed to the gales of wind, which happened after she shaped her course for *New Providence*, which, however, might have increased her leaky condition before she went into port.

For plaintiffs, in reply, it was admitted, that if a vessel is not seaworthy at the time of sailing, it will vitiate the policy. But it was insisted that a vessel might become disabled within twenty-four hours after she went to sea, and that would not vitiate the policy, and that it was owing to the heavy gales she met with which disabled her.

The jury to whom this case was submitted, found a verdict in favour of the plaintiffs for 1,400 dollars, the amount of the sum in the policy. And the present was a motion for a new trial, on the ground, that the verdict was against the weight of testimony, and the strong presumptive evidence, arising out of the circumstances of the case.

The court after hearing the arguments, was of opinion, that there were good grounds to justify a new trial, inasmuch as the presumption was exceedingly strong that the vessel was not seaworthy when she sailed. She proved leaky the day after she went to sea, when there was no violent or tempestuous weather to occasion the least injury, and the leak continued to increase till the 27th, when the captain and mariners were obliged to bear away for *New Providence*. If the gales which happened afterwards, had taken her upon going to sea, or before her leaky condition was discovered, in such case, there might have been some reason to have concluded that she might have been injured by the high winds and heavy seas; but on the contrary, her bad condition was discovered before the stormy weather came on. This was sufficient to raise a strong and violent presumption, that she was not seaworthy when she sailed, and which presumption has not been rebutted by any testimony.

Rule for new trial made absolute.

All the Judges present.

TUNNO and COX *ads.* JOHN SUKELEY. *Charleston*, 1803.

Where a merchant appoints an agent for a special purpose, as purchasing a cargo, and authorises him to draw bills for the amount, &c. and the agent takes upon him to draw bills for another purpose, on his own account, he is not bound to accept or pay such bills.

SPECIAL action on the case for not accepting and paying a bill of exchange drawn on defendants by captain *Doane*, at *St. Domingo*. Verdict for plaintiff. Motion for new trial.

Captain *Doane* commanded a vessel belonging to the house of the defendants in *Charleston*, and was specially employed by them to proceed to *St. Domingo*, and there to purchase sugar, cotton, coffee, and other *West-India* produce, and to draw bills on them for the amount.

While at the *Cape*, transacting this business, *Doane* got into a law-suit about a negro he had sold, and was put into prison; and in order to extricate himself from gaol, he drew the bill in question on the defendants, in favour of the plaintiff, who knew captain *Doane* had a credit from the house in *Charleston*.

The defendants, however, discovering that this bill was drawn for a different purpose than that of purchasing *West-India* produce for their account, agreeably to their instructions, refused to accept or pay it. Whereupon plaintiff brought his action, and recovered a verdict in his favour, upon the general law of merchants, that principals were bound by the acts of their agents or factors, &c.

This was, therefore, a motion for a new trial, on the ground, that the letter of instructions given by defendants, was for a *special* purpose, to wit, that of purchasing *West-India* produce, and no other; and that as *Doane* had taken upon him to draw on them for a very different one, on his *own* account, and not on theirs, they were not bound to pay it.

The Judges, after considering this case, were of opinion unanimously, that the Jury had found a verdict against

Tunno & Cox ads. Sukeley.

the law of merchants, and the tenor of the instructions given by the defendants to their agent, captain *Doane*.

Rule for new trial made absolute.

All the judges present.

Charleston, 1803.

JOHN TAYLOR *ads.* MOSES MEYERS.

Where the subscribing witness to a bond or note, cannot be produced, his hand-writing must be proved before plaintiff can prove the hand-writing of the obligor or maker of a note, notwithstanding the act of 1802 allows the plaintiff to prove bonds or notes by other persons than the subscribing witnesses.

DEBT on bond. Verdict for plaintiff in *Georgetown* district. Motion for new trial.

In this case the presiding Judge (BAY) permitted the plaintiff to prove the hand-writing of the obligor to the bond, (under the late act for permitting parties to prove notes and bonds, by other persons knowing their hand-writings, than the subscribing witnesses,) without proving the hand-writings of the witnesses to the execution of it; when a verdict was found for the plaintiff.

This was, therefore, a motion for a new trial on the ground of the mistake of the Judge, in permitting this kind of testimony to be given, without proving the signatures of the witnesses.

In support of the motion it was urged, that, although the act intended to save the expense and trouble of witnesses to bonds and notes from attending in all cases to prove the execution of them, by allowing other persons to prove them, who might know the hand-writing of the obligor or party making the note, yet it did not destroy the common law rule of proving the hand-writings of the witnesses, in the first instance, before the plaintiff could be let in to prove the hand-writing of the obligor or maker of a note, in the same manner as if such witnesses were dead, or out of the jurisdiction of the court.

Gilb. Law of Ev. 99. *Runn.* 260. *Doug.* 205.

Taylor ads. Meyers.

The Judges, after hearing arguments, were of opinion, that, although the act is silent on the subject of proving the hand-writings of the witnesses to a bond or note, it was safest to conform to the old common law rules of evidence upon the subject, and prove their signatures in the first instance.

Rule for new trial was therefore made absolute.

The case of *Taylor* ads. *Meyers*, has since been overruled by the judges, and plaintiff may prove his note or bond without proving the hand-writings of the witnesses under the act of *December*, 1802.

N. B. The Judges, in a subsequent case, upon reconsideration of this point, were of opinion they had laid down the rule too strictly in the above decision, as inconsistent with the spirit of the act, which certainly was intended to remove, as far as possible, every difficulty out of the way, in proving bonds and notes, where there was no allegation of forgery, duress, or the like; and thought that the proof of the hand-writings of the witnesses might be dispensed with; and that proof of the hand-writings of obligors or parties making notes was sufficient, without proving the names of the witnesses.

BLACKLOCK and BOWER *against* JAMES GAIRDNER.

Charleston, 1803.

Where a plaintiff has occasion to lodge a writ against a defendant after the return day of any court, and before the first day of the sitting of such court, it may at once be made returnable to the 2d court, as it would be nugatory in that interval to make it returnable to the first court, after the return day had passed.

CASE on attachment issued on the 1st of *January*, 1803, and made returnable to *May* court, 1803, notwithstanding the *January* term, 1803, intervened between the teste and return.

A motion was made during the *January* term, 1803, before the presiding Judge, (GRIMKE,) to quash this writ, for the irregularity of the return, being to a second court next after the teste of the writ, instead of the next succeed-

Blacklock and Bower v. Gairdner.

ing court after issuing it, which, it was alleged, was contrary to all common law rules on that subject, as all writs and precepts should be made returnable to the court next after issuing them, otherwise there would be a chasm in the proceedings, by leaving out a link in the chain of continuances, which would vitiate them, or amount to a discontinuance; which was ordered accordingly.

And now it was moved to have the order of the circuit court, in *January*, 1803, rescinded, and the proceedings restored to their original order. In support of this motion it was urged, that the act of 1792 had altered the common law, with respect to the return of writs and processes in our courts of justice, which declares, "That all writs and processes lodged after the return day of any court, and before the first day of the sitting thereof, *shall not be void;* but shall be *good for the second court.*" On the construction of this clause in the act, it was said, that if the clause of the act under consideration, declared that a writ served after the return day of a court, and before the sitting thereof, should not be void, but should be good for the second court, it would not be straining the act too far to say it might (in that interval between the return day and the first day of the court) be made returnable *at once* to the second court. There could be no error in making a process expressly returnable to a day certain, which was good by implication or construction. This, it was said, would at once be giving the act its true and legal efficacy and operation, without the aid of implication.

And of this latter opinion were all the Judges, who observed, that this construction of the act would, in future guard against a failure of justice, between the return day, and the first day of the sitting of the court afterwards; and would, at the same time, make the practice more liberal, agreeable to the true intent and meaning of the act of 1792, as it would be a nugatory act to make it returnable to the next court, after the return day was past.

The order for quashing the proceedings made in the circuit court, was therefore rescinded and set aside, and the writ and proceedings were restored.

Blacklock and Bower v. Gairdner.

All the Judges present.

CONNOLY *against* STEWART.

Charleston, 1803.

THIS was a question between two mortgages of the same land, to determine the right of priority.

Where there are two mortgages of the same land, and the elder one is recorded in the *secretary's office*, and the younger one recorded in the *register's office*, the latter shall have a preference, because first recorded in the proper office.

Connoly had the eldest mortgage, and *Stewart* the younger one. But the former was recorded in the secretary's office, and the latter in the office of the register of mesne conveyances. In this state, both the mortgagees remained contented and satisfied, till an execution had been lodged in the hands of the sheriff of *Charleston* district, who sold the land, and was about paying over the money arising from the sale, and as there was not a sufficiency to pay them both, as well as judgment on which the execution had issued, the question was, who should have the money?

The Judges were unanimously of opinion, that *Stewart*, who had the youngest mortgage, should have the preference, because he had *recorded his mortgage first*, in the proper office for recording deeds *for landed property*, which is in the register's office. Whereas the prior mortgagee, *Connoly*, had recorded his mortgage in the secretary's office, which is the office appointed by law for recording mortgages and deeds for negroes, and other personal property, and not real property.

The act for preventing deceits by double conveyances, is very explicit and express upon this subject. It declares that "that sale, conveyance or mortgage of lands and

Consoly v. Stewart.

tenements, which shall be first recorded or registered in the register's office, &c. shall be held and taken to be the *first* sale, conveyance or mortgage." And that that sale or mortgage of negroes, goods or chattels, &c. first recorded in the secretary's office, &c. shall be held, deemed and taken, to be the first sale or mortgage, &c. in all courts of judicature in *South Carolina*. Hence it was most evident, that the act contemplated two offices for the recording of deeds of conveyances, &c. the one for *real or landed property*, and the other for *chattels or personal property*; and the man who is so incautious as to record a deed in either office, which should be recorded in the other, must take the consequences upon himself. This court has no power to afford him relief; the law is imperious, and must govern. The recording in an office not directed by law for the purpose, is tantamount to no record at all, as to other persons having first duly recorded their deeds for the same property, in the appropriate office directed by law for that purpose.

Rule made absolute, and the sheriff to pay the money over to *Stewart*, in discharge of his mortgage, which was first duly recorded.

All the Judges present.

N. B. Divers acts of assembly have consolidated both these offices into one, in most of the country districts; but they are still distinct and separate offices in *Charleston* district.

SAMUEL MAVERICK *against* THOMAS STOKES. *Charleston,* 1803.

Where a negro claims his freedom from a person residing in a sister state, a paper purporting *to be a pass only*, will not amount to a manumission, although it appear that such negro may have been permitted to have worked out, for his own emolument, in such neighbouring state.

SPECIAL action on the case, in nature of a writ of ravishment of ward, to try the freedom of a negro man, named *Michael*.

In support of this action, several witnesses were called by the plaintiff, who deposed, that they had known the negro in question at *Baltimore*, where he had kept a cake and ale house; and also in *Wilmington*, in the state of *Delaware*, where he pursued some other business; and that in both places he appeared to be independent of any master, and conducted himself like a free man.

In further support of the plaintiff's case, the following written certificate or paper was produced, (to wit.)

"This is to certify to all whom it may concern, that *Michael*, a negro about 5 feet 9 inches high, 21 years of age in *August* last, has my permission to go about his lawful business; but it is understood that this is not to operate as a pass, if ever the said *Michael*, or *Peggy Burton* his wife, should return to the state of *Maryland*, but that he shall be liable to be taken up and treated as a slave."

"Given under my hand at the city of *Baltimore*, this second day of *April*, 1799.

(Signed,) "*Thomas Rutter*."

On the part of the defendant it was proved, that the said negro *Michael* did, in violation of the condition in said certificate, return to the state of *Maryland*. And it was mutually agreed upon by the parties to this suit, that the sole question in this case should be, whether the ward of the plaintiff was free or not? and that no question should be made as to defendant's title, or how he came by him.

Dessaussure, on the part of the plaintiff, contended, that his keeping a house, and dealing for himself in the place

Maverick v. Stokes.

where his supposed former master resided, and his removal afterwards to the state of *Delaware*, and carrying on business there for himself, as if he had been a free man, were of themselves presumptive evidence that he must have been manumitted and set at liberty. And the paper produced, it was contended, operated as such to all intents and purposes; for it permitted him to go about *his lawful business*. This lawful business, it was urged, gave him his permission to go where he pleased, and to pursue what calling or profession he pleased, for a livelihood; and that too without limitation of time, or any accountability to his former owner whatever, which amounted to as complete a manumission as well could be framed; and the very condition annexed to this manumission proved it. For it says, *if ever he should return* to the state of *Maryland*, or his wife *Peggy Burton*, *then he should be liable to be taken up, and treated as a slave*. These latter words prove most clearly, that it was the intention of his master never to consider him as a slave again, provided he did not return to the state of *Maryland*. Now admitting this to be the fair construction of this instrument of writing, that he was manumitted and set at liberty by it, was there any law, it was asked, either common or statutory, either in *Maryland*, or any other of the states, which entailed the condition of slavery on any man for entering into the limits of that state, who was once set at liberty? it was assumed as a position, there was none; and if none such was produced, then the negro in question was clearly entitled to his freedom. The mere condition annexed by the former master, was an arbitrary, as well as a nugatory, act; it was *ipso facto* void in itself; for by the law of *England*, which was a part of the common law of this country, a deed of emancipation could not be conditional, between a lord and his villein. Any condition in such a deed, restrictive of liberty on certain conditions, was void and of no effect.

Mr. *Cheves*, for defendant, argued, that notwithstanding all that had been urged by the plaintiff's counsel in this case, there was no proof that ever this negro had been manumitted or set at liberty; for although several witnesses had seen him apparently working for himself, and carrying on business as if he had been free, yet it was no proof of freedom, as it was not an uncommon thing for indulgent masters to give their slaves this privilege in the northern states. And as to the paper writing which had been produced, it could fairly be considered as amounting only to a pass from his master or owner, during his pleasure, which the master had a right, at any time, to countermand, when he pleased. He next contended that a master has such an absolute command or right over his slave, that he might make or impose what conditions he pleased upon him, and there was no law to restrain him from doing so; that the paper writing produced, was one of this kind; it gave the *negro permission to pass* about his business, that is, to work for himself, unti he thought proper to withhold this permission. Was there any thing in this pass which restrained him from the exercise of that power when he pleased? None. Then as to the return of the negro; he was in that event to be considered and treated as a slave. Was there any thing in this instrument which prevented him from doing so before, if he thought proper? None. In fact it was only expressive of the master's will and pleasure, to treat him like a slave upon his return; but as long as he kept away, he would not exercise that power. He did however return, and thereby forfeited every kind of pledge which the master might have given him not to treat him as a slave; so that if any kind of conditional contract could be considered as ever having been made between them, it was broken on his part, and he could no longer claim the benefit of it.

The presiding Judge, (GRIMKE,) in charging the jury

Maverick v. Stokes.

told them, that if this paper produced could be considered as a contract between the master and his servant, the condition had been broken by the plaintiff's ward, the servant, and consequently that such contract was dissolved. It therefore followed naturally from the premises, that the plaintiff's ward had failed in proving himself to be a free man, and by the act of assembly of our state, the burthen of the proof is thrown upon the shoulders of the party claiming his emancipation. But the jury, contrary to the opinion of the Judge, found for the plaintiff.

This was then a motion for a new trial on the grounds,

1st. That the paper produced in evidence as proof of a manumission of the ward of the plaintiff, was only a pass from a master to his slave.

2dly. That if the same could be considered as importing a manumission, the condition on which it had been granted had been violated, and therefore it was void.

This case was again very fully argued on this motion for the new trial, and the same grounds nearly which had been taken on the trial of the issue were again urged on this argument.

The Judges, after fully considering the case, were of opinion, that the writing given in evidence on the trial, and which it was contended amounted to a manumission, was nothing more than a pass or protection against others who might claim the slave, and did not amount to a dereliction of such slave, or a renunciation of the master's right to him.

The temporary indulgence of the master, that his slave should or might work for his own emolument, could not be construed to amount to an emancipation, but only a temporary suspension of his claim to his services.

A new trial was therefore ordered, as the verdict was against law, and the charge of the presiding Judge.

Present, BAY, JOHNSON, TREZEVANT, and BREVARD.

CASES

ARGUED AND DETERMINED

IN THE

CONSTITUTIONAL COURT OF APPEALS,

OF THE

STATE OF SOUTH CAROLINA,

IN THE YEAR 1804.

AT a meeting of the legislature, in the month of *May*, 1804, (Mr. Justice JOHNSON having been appointed one of the Judges of the supreme court of the *United States*, in the room of Judge PATERSON, deceased,) the Hon. THOMAS LEE was elected one of the associate Judges of this state, in the place of Judge JOHNSON, promoted to the supreme judiciary of the *United States*, and took his seat accordingly.

Judge LEE's appointment in the room of Judge JOHNSON, promoted to a seat on the supreme judiciary of the *United States*.

THOMAS SUMTER *against* WILLIAM BRACEY. *Columbia*, 1804.

TRESPASS to try titles to land in *Sumter* district. Verdict for plaintiff. Motion for a new trial.

Where marked line trees and corners can be found, they ought, in all cases in making resurveys of land, to govern; but where they cannot be found, then courses and distances are to be resorted to, as the next best guides in surveying.

Sumter v. Bracey.

This was a case which turned upon the lines of the lands in dispute, and more particularly one line of the tract.

It appeared from the plat returned by the surveyor appointed by the court, with the assent of both parties, that a line of marked trees which had been made on the original survey, when the tract had been run out, *was found*, but it did not correspond exactly with the course and distance laid down in the original plat annexed to the grant, nor did the corner tree which was found, extend out as far as the distance called for, which left the land in dispute in the plaintiff's survey; and the question was, which should be the true rule, the line and corner found, or the course and distance?

When, after argument, the Judges determined, that in all cases where the original marked trees and corners, or natural boundaries can be found, they should govern in making resurveys of lands, whether the quantity be more or less than is mentioned in the original grant. *Because they are the original metes and bounds fixed by the grantee himself or his agent, as well as by the state, at the time of making the original survey;* and it will not be permitted either to the grantee or the state, afterwards to say that they will not be bound by them; for these lines are generally notorious in the neighbourhood, and the surrounding tracts are always governed and bounded by those that are older; and unless they were taken to be the true lines, it would be a deception and fraud on all the younger grantees. But in all cases where no lines or corners, or natural boundaries can be found, then courses and distances must be resorted to, as the next best rule for establishing lines.

New trial refused, and rule discharged.

Present, GRIMKE, WATIES, BAY, BREVARD and LEE.

Executors of JOHN WILLSON *ads.* MINOR WINN. *Columbia*, 1804.

A release to one co-obligor to a bond, is a release and discharge to the whole of them; and the assignee of such bond (not consenting of such release) may recover the balance due on the bond from the assignor, where there is a guaranty of the payment.

SPECIAL action on the case, tried in *Fairfield* district. Verdict for plaintiff. Motion for new trial.

This action was founded on the special guaranty of a bond, assigned by the deceased *Willson* in his life-time, to the plaintiff *Minor Winn*. It appeared, that in the year 1784, the bond above mentioned was given by *Adam Fowler Brisbane*, *John Winn*, *Hugh Milling*, and *James Brown*, to the deceased *John Willson*, for 435*l.* sterling. Some time after the bond became due, *John Winn*, one of the obligors settled with the obligee *Willson*, for his one-fourth part or share of the bond, by delivering him a negro and a horse, which *Willson* accepted of for his full proportion of the debt, and executed a release in due form, for his share of the principal and interest due on the said bond.

This bond afterwards, in some transaction between *Willson* and the plaintiff, *Minor Winn*, was assigned over to the latter; and at the time of the assignment, *Willson*, by an agreement in writing under his hand, agreed to guaranty the payment of the balance due on the said bond. The bond was afterwards put in suit against the other obligors, but nothing could be recovered from them, as they pleaded the release to *John Winn* in bar of the obligation. In the mean time, *Willson* died, and this suit was brought against his executors, upon the deceased's guaranty, when a verdict was given by the jury for the bala[illegible] of principal and interest due on it, after deducting the payment made by *John Winn*.

The present was therefore a motion for a new trial, on the ground, that the presiding Judge had refused, on the trial, to let the defendants go into proof, in order to

Executors of Willson ads. Winn.

show that the other obligors were fully able and solvent, and could have paid the balance due on the bond, if due diligence had been used, and that it was the plaintiff's own fault that the money had not been recovered.

For the plaintiff, in reply, against the motion, it was urged, that such kind of testimony was totally irrelevant, as it was very immaterial whether the three other obligors to the bond were solvent or not, as the release to one of the co-obligors, *John Winn*, was a release to the whole, if they chose to take advantage of it. Consequently, the bond had been by the testator's own act, cancelled and destroyed, which left him responsible on his guaranty.

The Judges, after hearing counsel on both sides, were unanimously of opinion, that the release of one co-obligor to a bond, was a release to the whole of them, and operated as a full discharge in law, of the money due thereon; consequently, the deceased became liable to make good to the assignee, the balance due upon it, upon his guaranty.

Co. Litt. 232. 1 *Esp. Dig.* 243.

New trial refused.

Blanding, for plaintiff. *Egan*, for defendant.

Present, GRIMKE, WATIES, BAY, BREVARD and LEE, Judges.

The JUDGES of FAIRFIELD COUNTY *against* PHILLIPS. *Columbia, 1804.*

Where administration bonds were made payable to the former judges of the county courts, which are now abolished, the suits on them should be brought in the names of the ordinaries of the districts, as their successors in office.

DEBT on an administration bond. Plea in abatement, that there were no such officers in existence, as the judges of *Fairfield* county, &c. which plea was sustained by the circuit court.

This was a motion in arrest of judgment. But it was refused by the Judges unanimously, as they were of opinion, that since the abolition of the county court system, and the consequent cessation of all the county court judges from office, the suit should have been brought *in the name of the ordinary of the district*, to whom the jurisdiction of all matters relative to the probate of wills and testaments, and granting of letters of administration of intestates' estates, &c. have been by law transferred, and to whom it originally belonged, as a matter peculiarly belonging and appertaining to his office. And that this point had been determined in a case from *Abbeville* district, where a suit had been brought in the name of the county court judges there, against *Stephen Bostwick*.

The motion was therefore refused, and the decision of the circuit court confirmed.

Present, GRIMKE, WATIES, BAY, BREVARD and LEE, Judges.

Columbia, 1804.

The STATE *against* CALEB JONES,
and
The STATE *against* THOMAS M'CARTAN.

Where a jury in a criminal case will find a verdict contrary to, or without evidence, as well as against the opinion of the presiding Judge, this court will, upon a report of the Judge who tried the cause, order a new trial without argument.

THESE were two criminal cases, tried in *Spartanburgh* district, in which the defendants were convicted of larceny. Motions for new trials.

Judge WATIES, before whom the defendants were tried and convicted, in his place on the bench, reported to the other Judges, that in his opinion, there was no evidence offered in these cases, sufficient in law to convict either of the defendants, and so he charged the jury. But that such were their prejudices against the defendants, that they convicted them both, against his opinion and direction.

Whereupon the court, upon his report, ordered a new trial, without hearing argument.

Present, GRIMKE, WATIES, BAY, BREVARD and LEE, Judges.

Columbia, 1804.

MELINUS C. LEVINGSWORTH *et al. ads.* JOHN FOX.

Where a jury take upon themselves to presume fraud where none is proved, the court will grant a new trial, as the due execution of the law depends upon a strict adherence to the rules of evidence.

TRESPASS to try title to lands in *Edgefield* district. Verdict for plaintiff. Motion for a new trial.

This was an action of trespass to try titles to land on *Savannah* river, in which the Jury took upon them to find that a release produced and given in evidence by defendant, *was fraudulent*, without any proof of its being so, or of any circumstances from which it could be strongly inferred.

Upon this ground the court, after argument, ordered a new trial, as fraud is never to be presumed, unless the circumstances are so strong as to leave no doubt to the contrary, as was determined in the case of *Rutherford* v. *The Sheriff of Charleston District*, in 1801; and also because one *Rountree*, a witness produced by the plaintiff on the trial, appeared, since the cause was tried, to be deeply interested in the event of the suit, (having a claim to part of the same lands in dispute,) although in court he swore upon his *voir dire*, that he was not in the least interested in the case, one way or the other.

Levingsworth et al. ads. Fox.

See the case *Rutherford* v. *The Sheriff of Charleston District. ante.* Where it appears that a witness, sworn and examined, was deeply interested in the event of a cause after it is tried, (although upon his *voir dire* he swore he was not,) it is a good ground to order a new trial.

Rule for new trial made absolute.

Present, GRIMKE, WATIES, BAY, BREVARD and LEE, Judges.

HANE and BERCK *against* JOHN GOODWYN.

Columbia, 1804.

A CASE from *Richland* district. Motion to set aside the order of the circuit court of *Richland* district, in refusing to allow the defendant leave to plead double.

This was an action on a note of hand, and plaintiffs had filed their declaration, posted their rule to plead, and obtained a judgment by default, and the case was duly placed upon the writ of inquiry docket; on the call of which, in its order, agreeable to the rule of court, the defendant's attorney, Mr. *Starke*, moved to have the order of judgment set aside on payment of costs, with liberty to place it on the issue docket, and to plead double, (viz.) *non assumpsit*, and *non assumpsit infra quatuor annos*, which was opposed by the plaintiffs' counsel, on the ground that he did not

Where there has been a judgment by default, defendant has a right to set it aside on motion, on the call of the writ of inquiry docket on the first day of the court, with liberty to plead any plea he may think proper.

Kane & Berek v. Goodwyn.

come prepared to contradict the latter plea, although he was ready to prove the note; and that if the motion was granted, it would have the effect of putting the cause off till another court, which would be an unreasonable delay, contrary to the rules of court; that it was a surprise on the plaintiffs, who only came prepared to prove the note, and not to take the case out of the statute of limitations, which should have been pleaded in due time, that the plaintiffs might have had an opportunity of proving a subsequent assumption, so as to have taken the case out of the statute.

Upon this ground the presiding judge (BAY) refused the motion to plead double, and upon the further ground also, that if this doctrine was once introduced, of permitting defendants to put in pleas in bar instead of pleading issuably, on setting aside judgments by default, agreeably to the rules of court, it would almost in every such case, operate as a postponement of the cause till the next succeeding court, to the great delay of justice, and contrary to the uniform practice of our courts. The plaintiffs then went on, and proved their note to the jury, who gave a verdict for the amount, with interest and costs.

This, therefore, was a motion to set aside this verdict, and to have the cause placed on the issue docket, with leave to plead double, as above mentioned.

. . . . . .

The Judges, after hearing counsel in this case, admitted that the practice had hitherto been, conformably to the *English* mode of proceedings, as laid down by the presiding judge on the circuit. But the alterations made by different acts of our legislature in this country, required a relaxation of that old practice, as indispensably necessary for the due administration of justice, more especially in the country districts; and unless the indulgence now claimed by the defendant was allowed, great advantages might be taken by the attorneys of each other, in the course of their practice, where those practitioners who resided near the

See 2 *Durnf. & East*, 390.

court-houses, or in the villages where the courts were held, were in the habits of posting their rules to plead on filing their declarations, and taking judgment by default at the end of the time allowed for that purpose, before the practitioners at a distance, or in a neighbouring district, could know any thing about it, or be prepared to make the necessary defences for their clients. It therefore became the duty of the court to promote a liberality of practice at the bar, so as to prevent those advantages from being taken, and to allow an opportunity to every man, of putting in any defence which the law allows him; and this could only be done, by allowing them the opportunity of setting aside those interlocutory judgments, and permitting them to plead issuably, or to file any other plea the party thought proper; and that the proper time for doing so was on the call of the writ of inquiry docket, on the first day of every court in each circuit.

The verdict was therefore set aside, and the cause ordered to be placed to the issue docket, with leave to defendant to plead double.

All the Judges present.

N. B. The above decision may be considered as having altered the *English* practice, which was to allow the defendant liberty of setting aside a judgment by default, upon condition of paying the costs, *putting in an issuable plea only*, and going to *trial instanter*, *i. e.* the same term. But by the above decision, the defendant may have one court to prepare for his defence, with liberty of putting in any plea he may think proper.

Columbia, 1804.

SIMS *against* RANDALL.

Where a sheriff takes upon him to sell *lands*, by virtue of an execution, after the time fixed for the return has expired, and to give title deeds for the land, such deeds are void, unless the *fi. fa.* had been duly renewed.

TRESPASS to try title to land in *Union* district. Verdict for plaintiff. Motion for new trial.

The plaintiff in this action claimed under a deed made by one of the sheriffs of the former district of *Ninety-Six*. The deed was in the usual form, and appeared to have been duly executed. And the plaintiff had a verdict.

But upon comparing the date of the deed, which was admitted to have been on the day the sale was made, with the execution or *fi. fa.* under which the land was sold, it appeared that the land was sold, and the deed executed, several months after the return day mentioned in the execution.

This, therefore, was a motion for a new trial, on the ground that the sheriff had no authority to make this sale.

The Judges, after hearing argument, were all of opinion, that a new trial should be granted in this case. For although it is clear that the seizing and levying of goods and chattels by operation of law, vests the property in the sheriff, so that he may go on and sell them at any time afterwards, and raise the money mentioned in the execution, and pay it over to the plaintiff in the action, yet it is very different with respect to lands or real estates. It still remains the property of the defendant in the suit, till actually sold. It is not the execution which binds the land, but the judgment; and the execution, as to lands, is only the authority to the sheriff to go on and sell under the judgment by which they had been previously bound. But this power, like all other delegated power or authority, has its bounds and limits. The execution itself fixes and limits this power, both as to the *quantum* of money to be raised by it, and the time within which it must be done; and it cannot

be carried further, or extended beyond the time limited by law for the return of the execution. Every execution has a day certain for its return, and every sale under it must be within the period or time fixed for such return, as the authority under it then ceases; to revive which authority, the execution must be regularly renewed.

Rule for new trial made absolute.

All the judges present.

MARANE *against* CARROLL.

Columbia, 1804.

TRESPASS to try title to land in *Abbeville* district. Nonsuit ordered. Motion to set aside the nonsuit.

On the trial of this cause, the plaintiff's attorney offered to read the affidavit of the plaintiff's son, shewing the loss of the original grant under which his father claimed, in order that an office copy of it from the records might be read in evidence to the jury, (the father being then so old and infirm as not to be able to attend at court, for the purpose of making it himself,) agreeably to the directions of the act passed in 1803. But the presiding Judge (GRIMKE) refused to admit the son's affidavit, as the act required that the affidavit to prove the loss of the original grant should be made by the plaintiff in the action, in order to admit an office copy in evidence. And therefore ordered a nonsuit, on the ground that the plaintiff had failed in making out his title.

This was a motion to set aside this nonsuit, and to have the cause reinstated on docket for trial at the next court.

An affidavit of the loss of an original grant in order to permit an office copy of it to be given in evidence must be made by the plaintiff in the action, agreeably to the words of the act of 1803, and not by any third person.

Where the Judges are equally divided in opinion, the party bringing the case up, takes nothing by his motion.

Marsac v. Carroll.

In support of the motion it was contended, that the spirit and intent of the law was more to be regarded in the construction of statutes, than the strict letter. That the intent and meaning of this act was, that the proof of the loss of the original grant should be made, before an office copy should be received in evidence; and it was not of so much importance by whom this proof was to be made, as that the fact itself should be established before the office copy should be allowed to be given in evidence. Besides, it was more congenial to the principles of the common law, that this proof should be made by a third person not interested in the cause, than by the party himself in his own case. It was further urged, that the old and infirm situation of the plaintiff in the action, was a strong and forcible reason why the court should have relaxed in a rigid and literal construction of the act, and permitted the son's affidavit to have been received, to prove the loss of the grant.

To this it was answered, on behalf of the defendant, that the act was positive that the affidavit should be made *by the plaintiff in the action*, in order to make an office copy admissible evidence, and that *expressio unius est exclusio alterius;* that there was no room for a contrary construction in this case, the act was imperative. It was also urged, that if courts of justice once begin to make the spirit of a law their rule of action, regardless of the letter of the statute, it would be opening a door for vague construction without end, which might entirely go to defeat the purposes of the law. If it was necessary to amend the act under consideration, the wisdom of the legislature would correct the evil; but until that is done, this court has no right to say that such affidavit shall or may be made by any other person than they have declared by their act, it shall be made.

The Judges, after deliberating on the proper construction to be given to this law, differed in opinion upon it.

WATIES and BAY held, that, as this act of 1803 was a remedial law, and in furtherance of justice, it should have a liberal construction. That the spirit and meaning of an act was the principal thing to be regarded, and wherever that can be discovered, it should be the governing principle in carrying the act into execution. That in the present case, the proof *of the loss of the original grant* was the thing to be regarded, before the office copy could be given in evidence. And whether that proof was made by the plaintiff himself in the action, or by another on his behalf, it equally answered the end and design of the act, by establishing the loss of the original. The main fact the law had in contemplation as a prerequisite to the admission of the copy, was proof of the loss of the grant. They therefore thought the affidavit should have been received to prove this loss; consequently, that as the nonsuit was ordered for want of such proof, it should be set aside, and the cause restored to the docket.

BREVARD and LEE, thought they were bound by the terms of the act, that "*the oath should be made of the loss of the original by the plaintiff in the action.*" That it might have a dangerous tendency, to open a door for construction, where the words of the law were sufficiently plain without it. In doubtful and obscure statutes, they admitted the principle, that the spirit and meaning should be the governing rule of construction; not so, where the words of the act were plain and explicit, as in the act under consideration. They therefore were of opinion, that the presiding Judge was regular in rejecting the affidavit offered, and that the nonsuit should stand confirmed.

As the presiding Judge (GRIMKE) was precluded by law from giving any opinion on any point which he had previously decided, the other Judges were equally

Marane v. Carroll.

divided, consequently the plaintiff took nothing by his motion.

The nonsuit, therefore, stood confirmed.

Columbia, 1804.

ABRAHAM AVAUNT and WIFE, late Mrs. GANEY, *against* ANTHONY SWEET, Sen.

Where a father makes a parol gift of a negro wench to his daughter on her marriage, and says he will give her another, naming her, and afterwards actually sends her the other one, this is a good evidence of the gift of the second wench. But if the father afterwards takes this negro wench back again, and gives her to a son, and keeps her 10 years in possession and the husband and wife do not bring their action to recover her, their right will be barred by the statute of limitations.

TROVER for sundry negroes, tried in *Marion* district, before TREZEVANT, J. Verdict for plaintiffs. Motion for new trial.

From the report of the Judge who tried this cause, it appeared, that *Sweet*, the defendant, who was the father of plaintiff's wife, upon her first marriage with one *Ganey*, deceased, gave her a negro wench named *Phœbe*, by taking her by the hand and delivering her to his daughter, and at the same time telling her he would give her another girl named *Peg*; which he some time afterwards sent to her, agreeably to his promise. It appeared further from the report, that the father, by some means or other, got *Peg* back from his daughter, and took her home again to his own house, and by deed of gift conveyed her to his son, *Silvius Sweet*, which deed was afterwards duly recorded. And this wench remained 10 years in the possession of young *Sweet*, or his father as his guardian, till after *Ganey's* death, and her second marriage with the present plaintiff, *Abraham Avaunt*, when this suit was brought for recovery of *Peg*, and her children born in the mean time.

It further appeared from the testimony, that soon after the defendant, *Sweet*, got *Peg* back into his possession, he sent a shawl, and some other articles to his daughter, Mrs. *Ganey*; and upon some uneasiness being expressed by another daughter, he told her these articles were not

Avaunt and Wife v. Sweet.

presents to Mrs. *Ganey*, but for *Peg's* wages. Upon this testimony, under the direction of the Judge, the jury found a verdict for the plaintiffs.

This, therefore, was a motion for a new trial, on the following grounds: 1st. That there never was any valid gift of *Peg*, by the father to his daughter, Mrs. *Ganey*; and, 2dly. If ever there was, the right to her was afterwards lost or barred, by the statute of limitations.

1st. On the first ground it was contended, on the part of defendant, that although in this case there was proof of an actual gift and delivery of the wench *Phœbe*, there was none of the girl *Peg*. It did not appear that ever the defendant *Sweet*, the father, had parted with his property in her, although it was said he had sent her to his daughter, who had had the use of her for some time; but it was urged,

2dly. That even admitting that the father had actually given *Peg* to Mrs. *Ganey*, his taking her back, and making a deed of gift of her to his son, which was duly recorded, and keeping her 10 years after as the property of his son, gave him a legal title to her under the statute of limitations; which declares, that "*four years' possession of a negro or other chattel, was a good title against all others claiming such property;*" so that *Ganey* and his wife, suffering the wench in question to remain so long in the peaceable possession of the defendant *Sweet*, who was the guardian of his son *Silvius*, was an actual dereliction of the right to the wench. That the defendant *Sweet* could not in this case be considered as the trustee of his daughter, Mrs. *Ganey*, after he had made a deed of gift to the son, which had been duly recorded; and this, it was contended, was notice to all the world, of an adverse claim absolutely on the part of the son, which for ever barred the plaintiffs of their right to the wench *Peg*, and her issue.

On the part of the plaintiffs, in reply, it was argued, that a father's suffering property to go over to a child upon mar-

Avaunt and Wife v. Sweet.

riage, had always been considered as a gift, or part of her marriage portion; and our courts of justice had ever supported and upheld such rights, as of the highest nature known in law; and a great variety of cases have been determined on those principles, in different parts of the state. The gift therefore was complete in the present case, by the father's saying, when he gave *Phœbe*, he would give his daughter *Peg* also, and his actually sending her home to her, agreeably to his promise. But it was observed, that the defendant *Sweet* took *Peg* back again. To this it was answered, that he had no right to do so, for having once parted with his right, which became vested in the plaintiff's wife, it was gone from him for ever; and it was an unlawful act in him to take her away from his daughter, and retain her so long in his possession. And as to the deed of gift to his son *Silvius*, it was null and void, for he had previously given her away to his daughter; consequently, he had no right to make such deed. It is true that the wench did remain 10 years in the father's possession after he took her back, but he should be considered in the nature of a trustee for his daughter all this time; as it would have been a very harsh and unnatural thing, for a child to have sued a father for a property he had given her, especially at his advanced period of life.

See the case of *Johnston and Henderson* v. *Dilliard*, vol. 1. p. 232. *Riley's* edit. Also, *Neely* v. *Pemester*.

In this case, the Judges were unanimous in opinion, with respect to the gift of the wench *Peg* to Mrs. *Gamey*, after her first marriage, from the father, the defendant *Sweet*, as it had been determined over and over again, in a great variety of cases in this country, that a parent's permitting negroes, or other chattels, to go over to, or along with a child, after marriage, was a good transfer; and it has always been considered as a gift, or part of the marriage portion to such child, and intended as a provision for his or her advancement in life; and his sending the wench home to her after she had gone to house-keeping, was the same thing as if he sent her along with her, when she left

his house. But upon the legal effect of the adverse possession of the defendant *Sweet*, after he took the wench back again, there was a difference of opinion. Three of them, WATIES, BAY and LEE, were of opinion, that the act of limitations was too strong and imperious to be got over on the present occasion. Here was unquestionably an adverse possession, or holding over against the right of *Ganey* and wife; and they lay by all that time, and slept upon their rights, without pursuing their legal remedy to recover them; and this is precisely the kind of right which the statute says shall be for ever barred and taken away. And the policy of this act was to make men vigilant in pursuing their legal rights, and to prevent old dormant claims from rising up after a lapse of many years. If there had been any circumstances in this case, to prove that the defendant had acted as a trustee for his daughter, or had considered himself as such, that, indeed, might have taken the case out of the statute. But so far from that being the case, he took upon him to make a deed of gift of the wench, after he took her back, as if she had been his own property, which was duly recorded; and this was notice sufficiently notorious, that he did not mean to hold in trust for his daughter, Mrs. *Ganey*. The relationship between the parties, and the forbearance of *Ganey* and wife on that account to pursue their rights by action at law, may, and really does, make this a hard case; but that does not alter the rules of law, or the positive regulations of the statute upon the doctrine of possession. They were, therefore, for a new trial.

GRIMKE and BREVARD, were of a contrary opinion; they thought this an extreme hard case, and if there was any thing to bear them out in it, felt themselves disposed to give this case a contrary construction. The act of the defendant himself, after he had taken the wench away from his daughter, appeared to them sufficiently strong

Avaunt and Wife v. Sweet.

to justify a conclusion, that he either considered himself as a trustee for his daughter, Mrs. *Ganey*, or acknowledged her right of property, by paying wages for her; for it must be recollected, that it came out in the course of the evidence reported by the Judge who tried the cause, that once upon an occasion when another daughter complained of the partiality probably of the father, in sending a shawl and some other articles to this daughter Mrs. *Ganey*, that he said "*they were not presents, but for Peg's wages.*" Here then was a positive declaration or acknowledgment of *his paying wages for the use and labour of this wench on the part of the defendant himself*, notwithstanding he had taken upon him to make a deed of gift of her to his son, which it was highly presumable was only a colourable business.

From this it is evident, that he himself considered the property of the wench in his daughter, notwithstanding he had so detained her in his possession. This they compared to a tenant holding land, who pays rent to a landlord, in which case he never can gain a title by possession, or call the right which he himself acknowledges to be in the landlord, in question. So that whether in this case the defendant be considered as a trustee for the use of the daughter, or as hiring the wench and paying wages for her, they thought the right of property in the plaintiffs, and that the verdict should stand.

Rule, however, for a new trial made absolute.

SIMPSON and MORRISON *ads.* ROBERT GEDDES. *Columbia, 1804.*

ASSUMPSIT, tried in *Laurens* district. Verdict for plaintiff. Motion for new trial.

The declaration in this case contained two counts;

1st. For goods sold and delivered to the copartnership; and

2d. Another on a note of hand endorsed to the plaintiff, by the executor of *William Gist*, deceased.

To this action, one of the defendants, Mr. *Morrison*, appeared, *and pleaded separately* to the first count, *non assumpsit;* the other made default. To the 2d count, the copartner who appeared, pleaded the same plea of *non assumpsit*, and the other made default, in like manner as above.

Where one copartner appears, and the other makes default, the regular mode of proceeding is, for the plaintiff to go on and get judgment for the whole debt against the one appearing, and to execute his writ of inquiry against the one making default, for the whole also.

A letter written by one copartner after the dissolution of the copartnership, acknowledging the justness of a debt, will bind the other. And endorsement of a note by one executor, is good; but if the letters testamentary are called for, they must be produced, to shew his authority for that purpose.

On the trial, plaintiff's counsel urged, that this separate plea of one copartner to a joint action, was an evasion of a just demand on the part of the copartner who put in those separate pleas to a joint debt, which he considered as tantamount to making default; he therefore moved for leave to go on and prove his case against them both, as for a joint mercantile transaction, which was granted. He then produced a letter from one of the copartners, Mr. *Simpson*, acknowledging the receipt of an account current from the plaintiff, and that the balance was justly due to the plaintiff, as therein stated. To this evidence, *Morrison*, the other defendant, took an exception, alleging that this letter did not bind him, as it was written since the dissolution of the copartnership, by *Simpson* the other copartner, without his knowledge or approbation. But the presiding Judge (BAY) overruled this objection, inasmuch as this was no new contract or undertaking, since the partnership was dissolved; but the acknowledgment of a debt contracted

Simpson and Morrison ads. Geddes.

while the copartnership existed, which was binding on all the copartners. It was therefore permitted to go to the jury as evidence against them both.

To support the second count in the declaration, on the endorsed note of hand given by the defendants to the deceased *William Gist*, and negotiated by one of his executors after his death, the plaintiff's attorney then called two witnesses; one to prove the hand-writings of the defendants to the note, and the other to prove the endorsement of the note by one of *William Gist's* executors, transferring the note in question. Upon which, *Morrison's* attorney called for the letters testamentary on old *Gist's* estate, to show that the executor had a power to transfer this note. But this the presiding Judge overruled, as there was no profert of the letters testamentary in the count in the declaration on the note, nor was *oyer* of them demanded by the defendant, *Morrison*, when he filed his plea.

The plaintiff's attorney then proved the note and endorsement, and had a general verdict on both counts for the whole demand.

This was a motion for a new trial, on the several grounds of the exceptions taken at the trial. When, after hearing counsel on both sides, the court resolved, that the most regular mode of proceeding in a case like the present, where one copartner appears, and the other makes default, is for the plaintiff to go on and get judgment against the one appearing for the whole amount, and to execute his writ of inquiry for the whole amount against the one making default, by which means both will be bound for the whole amount, as if they had both appeared, or both made default. But as no injustice has been done the defendant *Morrison*, who alone contested the plaintiff's claim, and as he has had every advantage of his pleas that the law could allow him, the court did not think this a good ground for a new trial. With respect to the testimony offered in support of the first count, they had no doubt but it was regu-

Law of Partnerships, 237. 2 *Atk.* p. 511. *Case* 307.

lar and proper. It was not like a new contract made since the dissolution of the partnership, but only evidence of one made and fully due while the copartnership existed, and the acknowledgment of any one copartner on the behalf of the others, and who knows; and probably has been most conusant of the partnership concerns, will bind the others, as much as the acceptance of a bill of exchange by one on behalf of the whole, will bind the rest.

Simpson and Morrison ads. Geddes.

1 *Salk.* 126. 3 *Bac. Abr.* 590.

In regard to the second count in the declaration, a majority of the judges, GRIMKE, WATIES and LEE, were of opinion, that the letters testamentary should have been produced, to show the power of the executor of *William Gist* to transfer the note; and that there should be a new trial, unless the plaintiff would agree to release as much of the damages as the note and interest amounted to, which would leave the note out of the question.

BREVARD, contra, was of opinion, that the not demanding *oyer* of the letters testamentary, was a tacit admission of them, and that it was too late, after verdict, to take advantage of the party's own laches, in not making such demand, if he was doubtful of the executor's authority to negotiate the note.

1 *Cromp.* 135.

See also the case of *Thompson and Howard* ads. *Administrators of Kelly*, post.

BAY, who had presided at the trial, and who had overruled this objection, could give no opinion on this motion.

There was, therefore, a rule for new trial *nisi*, &c.

N. B. The plaintiff's attorney afterwards released the damages on the 2d count, which left the verdict on the 1st one unimpeached.

Columbia, 1804.

ABRAHAM COLLINS *against* JAMES KINCAID.

Lands which passed by descent from an ancestor to an heir at law, before the passing of the confiscation law, cannot be affected by it, for the offences of the deceased ancestor.

The confiscation act does not extend to the infant children of fathers who died before the act passed, declaring the offence, and inflicting the punishment.

TRESPASS to try title to land in *York* district. Verdict for defendant. Motion for new trial.

For the plaintiff in this action it was admitted, that the land in question was originally granted to *George Julien*, and that he died intestate in the summer of the year 1781, and that *Jacob Julien* was his eldest son and heir at law, who was an infant at the time of his father's death.

The plaintiff then produced a deed of conveyance of this land from *Jacob Julien*, after he came of age, to one *Jeremiah Craven*, and also another conveyance of the premises from *Craven* to himself, which, it was alleged, completed his title to the fee of the land.

The defendant rested his claim on the act of assembly, passed in 1782, commonly called the confiscation act, in which the lands of *George Julien*, the father, are confiscated to the use of the state, for adhering to the enemies of his country. Next, a title deed from the commissioners of forfeited estates, to one *John Moffat*, for the land in dispute, and a deed of conveyance from *Moffat*, to the defendant, *Kincaid*.

The jury, under the direction of the presiding Judge, (WATIES,) found a verdict for defendant; and the present was a motion for a new trial, as a verdict against law.

In favour of the motion it was urged, that, as a descent was cast upon the heir at law, young *Jacob Julien*, before the act passed, a law, however penal against *George Julien*, could not affect his title or interest. That law could only affect *George Julien*, if he had been living, or his estate, if he had died after the act passed. But by no possibility could it affect the right of an unoffending infant, who had come legally, by descent, into the right of the estate, be-

fore it was possible for him to do any act which could amount to a forfeiture of it. His name is not mentioned in the act; to extend the operation of it, therefore, by construction, to the innocent infant, would be subversive of the fundamental principles of justice, and the laws and constitution of our country.

To this it was replied, that the 19th clause of the act of confiscation related back to the 4th of *July*, 1776, and declared, that all the real and personal estates which the different persons named in the list attached to the act, (one of whom *George Julien* was,) possessed or were entitled to, from that day to the 12th *May*, 1780, when *Charleston* fell into the hands of the enemy, should be *confiscated to the state*. And that, as the deceased *George Julien* did, in his life-time, between those two periods, actually possess the land in question, it became forfeited to the state; and consequently the titles from the commissioners appointed by virtue of that act to a *bona fide* purchaser, was good and valid to all intents and purposes whatsoever. It was further urged, that although there are no express words in the confiscation act to cut off the descent from ancestors to heirs, in the intermediate periods from 1776 to 1782, yet it was obviously intended, and ought to have a construction to that effect; otherwise, the confiscation act might be rendered, in a great degree, a dead letter, as not embracing one half of the objects contemplated by it.

The Judges having taken time to consider this case, a majority of them, GRIMKE, BAY and TREZEVANT, were of opinion, that the land in dispute could not be affected by the confiscation act, as it had gone over to, and vested in, young *Jacob Julien*, the infant son, before the act passed. That all acts of attainder, before trial and conviction of offenders, for supposed offences against a state, working a corruption of blood, and cutting off the inheritance of

Collins v. Kincaid.

children, have always been considered by the wisest and best informed men of every age and country, as arbitrary and unjust, and even repugnant to the feelings of humanity: for which reasons, courts of justice ought to give them a very rigid construction, and circumscribe them within the narrowest possible bounds and limits.

That this 19th clause of the act particularly, was one of this description, and it related back to the year 1776, a period of more than five years previous to the passing of the act declaring the offence, and fixing the punishment for the commission of it. In this respect, it was an *ex post facto* law, little congenial with the principles of the *American* revolution itself, or the spirit of our laws, and constitution of our government, as it tended to punish innocent and unoffending children, for the supposed offences of their fathers against the state, before the law itself passed, creating the offence, or defining the punishment for it.

That in the present case, *George Julien*, the father, died in 1781, a year before the confiscation law passed. Upon the death of the father, the estate, by the rules of the common law, went over to the son, and then became vested in him.

In the year 1782, the confiscation law passed, which, among other things, declared that the offence of adhering to the enemy, should work a forfeiture of the estates of those who did adhere to the enemy. *George Julien* was not then in existence; he could not therefore be said to be adhering to the enemy; and when the law passed, the father had no estate to confiscate, for it had previously gone over by descent to his infant son, whose name is not mentioned in the act as having committed any offence against the state; it would therefore be against every principle of law, as well as justice, to punish him by forfeiture and confiscation of his estates. They were, for these reasons, in favour of a new trial.

Collins v. Kincaid.

BREVARD and LEE, contra. They thought the law was express and positive upon the subject, and there was nothing to prevent the legislature from passing it at the time; they were not circumscribed by a constitution, as at present, from making *ex post facto laws*. If a law to that effect was to be passed by the legislature at this day, it would be void and nugatory, because our present constitution forbids it. Nothing of the kind stood in their way at that day, when, perhaps, the policy of the times justified it. But that was not a matter for judicial consideration; the only point for their consideration was, whether that law was binding or not? and upon this point they had no doubt. They were, therefore, for confirming the verdict.

Rule for new trial made absolute.

THOMAS MIDDLETON *ads.* GEORGE PERRY.

Columbia, 1804.

TRESPASS to try title to land in *Lancaster* district.

N. B. This was a second trial, there having been nonsuit entered into in the first one. See *ante*.

Verdict for plaintiff. Motion for new trial.

One joint-tenant or tenant in common, who is entitled to one third part of lands, who sues by metes and bounds for the whole, may recover such third part.

In this case, the plaintiff was only entitled to one third part of the land in dispute, as a tenant in common with two others. He, however, brought his suit for the whole tract of 323 acres, by metes and bounds, and had a verdict for the whole, although he had only proved himself entitled to one undivided third part.

Parol testimony should be permitted to explain any mistake in a grant, and to shew the real situation of land to be on one water-course, when the grant calls for a different one, and that the land really and truly lies upon the waters of the *Catawba* river, instead of the waters of *Broad* river.

The defendant, however, claimed under an elder grant

Middleton ads. Perry.

to one *Littlejohn*, for 480 acres, which, it was contended, included the land in question, which, in the grant, was said to be on "*Cedar creek, waters of Broad river*," but offered to call witnesses to prove that there must have been a mistake made by the surveyor who originally surveyed the land, in saying the land lay on *Cedar creek, waters of Broad river*, when, in fact and in truth, it lay upon *Cedar creek, waters of the Catawba river*. That there were two creeks of the same name, called *Cedar creek*, one of which emptied itself into *Broad* river, and the other into the *Catawba* river. But the presiding Judge (GRIMKE) refused to suffer witnesses to contradict the face of a grant under the great seal, and the plaintiff had a verdict for the whole.

This was a motion for a new trial, on two grounds.

1st. That the plaintiff had got a general verdict for the whole tract, when he was only entitled to one third part of it.

2d. That defendant should have been let into parol proof to shew the mistake of the surveyor, and that the land in question really lay on the waters of the *Catawba* river, instead of the waters of *Broad* river.

In support of the motion on the first ground, it was laid down as a general principle, that a man must recover according to the strength of his title; and although he claims more, yet he can never recover more than he is entitled to; he may recover less than he claims, but that recovery must be according to the strength of his right and title, and no more. In the present case, it was said, he had recovered a verdict for the whole, which was more than he had a right to; consequently, unjust and against law.

1 *Burr.* 330. 1 *Morg.* 371.

2. On the second ground, it was admitted as a general rule, that parol evidence should not be admitted, to contradict, or vary the face of a grant or deed. But it was urged, that it was every day's practice, to admit parol

Middleton ads. Perry.

proof to explain any ambiguity or mistake in it. *White* and *Egan's* case, vol. 1. p. 247. (*Riley's* edit.) was relied on as in point to this purpose; also *Heyward's Reports*, 23. Besides, it was alleged, that in a thick woody country, such as this was when the survey was made, before the geography of it was properly known, it was no uncommon thing for surveyors to mistake the names of water-courses, and in the meanderings of creeks and branches, which run in all directions through the country, to suppose that some of them run into one river, which in fact ran into the other. It was therefore absolutely necessary to admit of parol testimony in many cases, to correct these mistakes; and unless this was done, in order to shew the true position or location of land, and to explain its real situation, it would be cutting off claimants to lands from one great source of information, essentially necessary to the ends of justice.

The Judges, having considered this case fully, were of opinion, that if it was necessary to go again into the first ground made in this case, that it should be governed by the principles laid down in the case of *M'Fadden and Wife* v. *Haley*, *ante*, and in this case, upon a former motion to set aside a nonsuit, at the same term, *ante*, but as this point had been previously settled in those and one or two other cases, they did not think it now necessary to give any further opinion upon it.

Upon the second ground, however, they had no doubt but a new trial should be granted, on the ground that parol testimony should have been admitted, to have explained any mistake in the location of the land mentioned in the grant under which the defendant claimed; and that such explanation was not repugnant to the statute of frauds, as had been contended for by the plaintiff. That our courts of justice had frequently permitted witnesses to be sworn, in order to rectify any mistake in the location of land, or even to explain deeds in cases of ambiguity or uncertainty, and the case of *White* and *Egan*, quoted in the argument,

Middleton ads. Perry.

was strong to that purpose. Where a grant called for a certain tract of land *on the south*, which was bounded on it *to the north*; in that case, witnesses were called to explain the mistake in the original grant, and to show the true situation and location of the land in dispute. And the authorities in the books are numerous on that head.

2 *Bl. Rep.* 1249. 3 *Durnf. & East*, 474. 2 *Atk.* 98, 99. 3 *Atk.* 389.

Rule for new trial made absolute.

All the Judges present.

Columbia, 1804.

The ORDINARY of KERSHAW District *against* WILLIAM BRACEY and J. NOURDIN.

In an action of debt on an administration bond, a party entitled to a distributive share of the deceased's estate, cannot recover more than his proportion of damages for any misconduct in an administrator, in not returning a true and just inventory.

The party who is entitled to such share, is not a competent witness to prove those damages.

DEBT on an administration bond. Verdict for plaintiff. Motion for a new trial.

In this case, there was a plea of performance generally. To this plea there was a replication that the administrator had not made a just and true inventory of the deceased's estate, as by law he was bound to do. To this replication there was a rejoinder, that he had never been called upon, or required to render in an account, till a day therein mentioned, (8th *March*, 1800,) and that he had then rendered in a just and true inventory; and plaintiff surrejoined, and defendant demurred to it, which demurrer was overruled; whereupon the cause went to the jury, who gave the plaintiff (who was entitled to one-sixth of the deceased's estate) his full distributive share, and the whole amount of the value of that part of the estate which had not been included in the inventory, by way of damages; and to prove the value of such part of the estate as was not included in the inventory, the real plaintiff, who was a minor under

the age of 21 years, and his guardian, were permitted to be sworn as witnesses.

Ordinary of Kershaw v. Bracey and Nourdin.

This, therefore, was a motion for a new trial, on two grounds. 1st. Because the jury had given more than the plaintiff was entitled to, on any principle of law and justice; and, 2dly. That that verdict was obtained on improper testimony.

The Judges, on both grounds, had no hesitation in ordering a new trial, as the plaintiff for whose account the suit had been commenced in the name of the *Ordinary*, on the administration bond, could not, by any possibility, be entitled to more than his one-sixth part of the amount of the deceased's estate, which had not been included in the inventory, in addition to his distributive share of the estate; and that the party entitled to such share, should not have been sworn to give evidence himself of the amount or value thereof.

Rule for new trial made absolute.

All the Judges present.

ANDREW PICKINS & Co. *against* STEPHEN GARNETT.

Columbia, 1804.

CASE on a demurrer, from *Edgefield* district, which was sustained by the circuit court. Motion to reverse this decision.

Where the names of the *surviving co-partners only*, are mentioned in the writ, but the names of the whole are set forth in the declaration, it is good, as the declaration is an enlargement of the original writ. It is sufficient for the court to give judgment on, which is all that the law requires.

This was an action of *assumpsit* for goods sold and delivered, and the writ was for defendant to answer unto

Pickens & Co. v. Garnett.

Andrew Pickins and John Owen, surviving copartners of Andrew Pickins & Co. But in the declaration it was stated, that defendant was attached to answer unto *Andrew Pickins and John Owen*, who had survived *John Lewis Gervais* and *John Rutledge*, called and known by the name of *Andrew Pickins & Co.*

To this declaration there was a plea in abatement, on account of a variance between the writ and the declaration, and for want of the proper names of persons in the original writ. To this plea there was a demurrer, which was overruled by the presiding Judge, (BAY,) and the plea in abatement sustained.

This was a motion to set aside the decision of the circuit court at *Edgefield* on the demurrer, and to overrule the plea in abatement, and to permit the plaintiffs to go on and get their judgment on their writ and declaration.

The court, after hearing arguments for and against the motion, thought proper to set aside the judgment of the circuit court on the demurrer, and to overrule the plea in abatement, as not sufficient in law to destroy the plaintiffs' right of action, in the manner and form as set forth in the pleadings.

Inasmuch as the names of the two copartners *in esse*, are named in the writ as the survivors of the copartners of the late copartnership, and the whole of their names are mentioned and set forth in the declaration, which is an enlargement of the writ, with sufficient certainty; so that it might be pleaded in bar to any other suit, that ever might be commenced for the same cause of action against the defendant. The addition of *Andrew Pickins & Co. in the writ*, shews very clearly, that the suit was not commenced for the use and behoof of *Andrew Pickins and John Owen only*, but for the use and behoof of *Andrew Pickins and John Owen*, and others who had been connected with them in trade and commerce; and the declaration explains fully

and clearly who those others were, who originally formed the copartnership. So that in fact there is no variance between the writ and declaration, the latter only more fully and at large explains who the parties were to the contract originally, and who have survived to maintain the suit.

It is laid down by the best expositors of the law, that the declaration is an explanation of the plaintiffs' writ, and shews more fully the foundation of the suit; and all that the law requires is, that it contain sufficient certainty for the court to give judgment on. *Co. Litt.* 17. a. 303. *Plowd.* 84. 4 *Bac. Abr.* 8.

In 2 *Stra.* 1232. a bill of *Middlesex* was to answer to "*the Weavers' Company*," and the declaration was in the name of the company *qui tam*, for themselves as the poor of the parish; and this was held good. On the authority of this case in *Strange*, the same point was determined in the case of *Lloyd* v. *Williams*, 2 *Bl. Rep.* 722. the *capias* did not express that the party sued *qui tam*, though the declaration did. And this was likewise held good. 1 *Wils.* 392.

Judgment on demurrer in the circuit court set aside.

All the judges present.

Bowie, for plaintiffs.

Goodwyn, for defendant.

Columbia, 1804.

JOHN TEASDALE, jun. *adv.* GEORGE REABORNE, Trustee for Mrs. OPRY.

A voluntary settlement made for the use of a man's wife after marriage, is not to be deemed fraudulent because it is voluntary, unless made to defeat purchasers or to defraud creditors.

Yet if there are grounds to apprehend fraud, court will grant a new trial to have those doubts cleared up.

TROVER for sundry negroes, tried in *Sumpter* district. Verdict for plaintiff. Motion for new trial.

This was a case tried before Mr. Justice GRIMKE, under whose direction the jury gave a verdict for the plaintiff. The case, as appeared from the report of the presiding Judge, was substantially as follows:

One *Hugh Opry*, being about to marry Miss *Reaborne*, the daughter of *George Reaborne*, on the 2d *May*, 1799, made a deed of trust of sundry negroes therein named, to the said *George Reaborne*, for the use of his daughter, his intended wife and her children, in case of death or accident; which deed was duly recorded the 4th *May*, two days after its date. The marriage soon after took effect, and the parties lived together for some time after in mutual love and affection. Unfortunately, however, in process of time, they quarrelled and separated; when *Opry*, the husband, took upon him to sell the negroes in question, which he had settled on his wife before marriage, to *John Teasdale* the elder, father of the present defendant, for 600 dollars.

The bill of sale was dated 14th *May*, 1800; part of the consideration money, 396 dollars, were paid down, and the rest, as was alleged, was to be paid when it suited *Teasdale's* convenience.

After this sale, *Teasdale* took the negroes into possession, and kept them till *November*, 1802, when they were seized by virtue of an *execution*, by the sheriff of *Sumpter* district, and sold at sheriff's sale, as the property of old *Teasdale*. At which sale the son, *John Teasdale* the younger, became the purchaser, at and for the sum of 416 dollars. After this sale, the younger *Teasdale* sold

Teasdale ads. Reaborne.

to the plaintiff *Reaborne*, one of those negroes, a boy, named *Bob*; but he very soon afterwards returned him back, alleging that he did not know of the deed of trust for the use of his daughter, Mrs. *Opry*; (not being present at the time of the execution of it, or when it was delivered into the office to be recorded;) but upon being informed there was such a deed, and finding it duly recorded, he thought it his duty to recover the negroes back for the use of his daughter. Upon which he made a regular demand of them, but defendant refusing to deliver them, he commenced this action, and had a verdict, under the direction of the Judge, in his favour.

This, therefore, was a motion for a new trial, on the ground that this deed for the use of the wife, was fraudulent against purchasers for *bona fide* consideration, and also against creditors.

Falconer, in support of this motion, contended, that this deed of trust was fraudulent against purchasers, as well as against creditors; and the more so, as both Mrs. *Opry* and her father were present at the sheriff's sale, and saw the negroes sold to young *Teasdale*, without interposing their claim, or forbidding the sale; which, it was urged, was a waiver of her right, and an acquiescence in the sale to *John Teasdale*, the father of the defendant, as well as in the right and claim of the plaintiff in the action, at whose suit the negroes were seized and sold.

It was further contended, and not denied, that Mrs. *Opry* herself had said that the deed of trust was a sham, and that if *Teasdale* the defendant would give her a trifle, she would give up the deed; and that she actually did receive part of the payments from old *Teasdale*, after the bill of sale was made.

It was further stated by the counsel in favour of this motion, that *Opry* himself was in debt at the time he made the deed of settlement, and therefore that it was void as against creditors, as well as against *bona fide* purchasers. It was

Teasdale ads. Reaborne.

therefore argued, that the court ought to grant a new trial, that all these matters might be more fully investigated.

In further support of this motion, defendant's counsel relied on the following authorities. *Roberts* on *Fraudulent Sales*, 66. 395. 403. Also, *Esp. N. P.* 205. 3 *Bac.* 313. *Coup.* 278.

Blanding and *Richardson*, in reply, argued, that voluntary conveyances were not void because they are voluntary; but to make them so, they must be made with intent to deceive *bona fide* purchasers, or to cheat creditors; that no such intention had been proved or made to appear in the present case. Mr. *Opry* not only had it in his power to make a comfortable provision for his intended wife, but actually did make one; and it was praiseworthy and honourable in him to do so. And the present was one of the many instances which shews the wisdom and propriety of such a measure. When this deed of trust was made, *Opry* was free from embarrassments; but, like a prudent man, foresaw that it might not always be the case, and therefore made the best provision in his power for the support of his wife and family, while there was nothing to impeach or call it in question.

Unfortunately, however, not long after the marriage an unhappy difference took place between them, and in a fit of disgust and resentment, he made a kind of bargain with old *Teasdale*, and gave him a bill of sale for the very negroes he had settled on his wife; and from the very nature of the transaction, it had the appearance of iniquity stamped upon the very face of it, and as if it had been done with a view to counteract his former benevolent intentions towards the woman he had loved; but the leading facts in this case were too strong to be gotten over by vague surmises and conjectures. In the first place, there was no proof that there was any dishonest intention in the parties when the trust deed was executed; it was fair and honourable in its commencement, and made for the most valuable con-

sideration known in law, that of marriage. Besides, it is a well established maxim that fraud is never to be presumed; it must be actually proved. Mrs. *Holman's* case is strong in point: there a deed was made, in order to reconcile man and wife after a separation, and it was held good even against creditors, as the husband had more than sufficient to pay all his debts at the time of making the deed, exclusive of the property then settled on his wife. And the proviso in the act made to prevent fraudulent conveyances, expressly excepts out of the provisions of the act itself, all deeds made upon or for good consideration, and *bona fide*, any thing in the said act to the contrary notwithstanding. This deed therefore, they contended, was unquestionably out of the statute against fraudulent conveyances.

Teasdale ads. Reaborne.

Vol. 1. p. 173. (*Riley's* edit.) See also *Fox and Levingsworth's* case, *ante*, p. 529.

Pub. Laws, 69.

They further urged, that whatever might be said in favour of purchasers for good and valuable consideration in other cases, very little could be urged in favour of this sale; because it appears, from the perusal of the bill of sale from *Opry* to old *Teasdale*, that six valuable negroes, worth at least 1,600 or 1,700 dollars, were sold for the small sum of 600 dollars, and only 396 dollars of that sum paid down; the rest to be paid as it suited the convenience of old *Teasdale*. This, they contended, at the first blush, carried suspicion of fraud on the very front of the transaction, and spoke a language too plain to be misunderstood, that there must have been some secret understanding between *Opry* and *Teasdale*. The time too when it was made was worthy of notice, as it was after *Opry* and his wife had quarrelled, and when he was publishing her all over the district, for incontinence, and unfaithfulness towards him.

That the sheriff's sale was another feature in this case, which made it still more suspicious. The execution was not against *Opry*, but old *Teasdale*; and his son was the purchaser of the negroes, at 416 dollars. The inadequacy of price, and the relationship between the defendant and

Teasdale ads. Reaborne.

the purchaser, father and son, has very much the appearance of contrivance, to defeat, if possible, the operation of the trust deed in favour of Mrs. *Opry*.

But admitting the demand for which these negroes were sold was a just one, and that *Reaborne* the trustee, and Mrs. *Opry* herself, were present at the sale, and did not forbid the sheriff from proceeding, nothing injurious to her just right ought to be inferred from this circumstance, because it does not appear that *Reaborne*, the trustee, knew of the trust deed at that time; on the contrary, it is very evident he did not, from his purchasing one of the negroes sold, a boy, from young *Teasdale*, afterwards; and his returning him again as soon as he discovered that such a deed had been made and recorded. And as to the loose random declarations of a woman in distress, not conusant of her legal rights, they were too light and trivial to be regarded. At any rate, she could do no act to defeat the trust deed, without the assent of her trustee, and the consent of *Opry* himself, who made it.

That as to *Opry's* being in debt at the time the deed was made, no demand or debt had been made to appear against him existing at that time, but 3*l.* sterling; and from his tax return, he had two negroes reserved to himself, and at his own absolute disposal, besides the negroes included in the deed of trust made in favour of Mrs. *Opry*; consequently, that pretext failed the defendant.

The Judges were all clear on one point, that wherever a voluntary conveyance is made for the use of a man's wife, or intended wife and family, it was not void, because it was voluntary. In order to make it so, it must be made with a view to defeat *bona fide* purchasers, or to defraud creditors. Mrs. *Holman's* case was full to this point; also, *Cowp.* 708. As to creditors, they appear to be out of the question in the present case, as *Opry* only owed 3*l.* sterling when the settlement was made, and had two negroes besides those named in the instrument.

Teasdale ads. Reaborne.

The only point in this case which can affect a *bona fide* purchaser, if defendant can be called one, is, that *Reaborne* the trustee, and Mrs. *Opry* were both present at the sheriff's sale, and did not forbid it; and her saying the deed of trust was a sham deed, and her receiving money from *Teasdale*, in part satisfaction of her claim. These circumstances, they thought, created some suspicions on the subject, and were sufficient to justify the court in sending the case back to a jury, to have these matters more fully investigated.

BAY and TREZEVANT, contra, thought there were no legal grounds to impeach this verdict.

Rule for new trial made absolute.

N. B. This case was tried a second time, when the jury found again in favour of the plaintiff.

RICHARD BOLAN *against* WILLIAMSON and CHAPMAN. *Columbia*, 1804.

SPECIAL action on the case, tried in *Richland* district. Verdict for plaintiff. Motion for new trial.

A postmaster is liable for money contained in a letter lodged in the postoffice, which is lost or purloined after he receives the letter.

But if such letter is delivered to his deputy, he shall be liable for his own neglects, and

This was a special action on the case against defendants, for 450 dollars, lost out of a letter lodged in the post-office in the town of *Columbia*, addressed to a mercantile house in *Charleston*. Mr. *Williamson* was postmaster in *Columbia*, and *Chapman* was his deputy. The plaintiff proved on the trial, the lodging of the letter in the post-office on the morning of the post day, by a witness who counted

not the principal. The payment of a premium is not necessary to make either of them liable; the general undertaking to deliver safely is a sufficient cause of action.

Bolan v. Williamson & Chapman.

the bank bills, and saw the letter folded up and sealed. It was further proved, that the letter covering these bills with the post marks on it, duly arrived by the mail in *Charleston*, but the bank bills had been taken out.

Upon this testimony the jury gave a general verdict for the amount of the money lost, against the postmaster and his deputy, jointly. It however came out from the witnesses who were present when the letter was lodged in the post-office, that *Williamson*, the principal, was absent, and that *Chapman* received the letter.

In support of this motion, it was argued, on the part of the defendants, that the postmaster was not liable as the principal in the office, because a post-office is not an office of *insurance*, but an *office of intelligence;* they do not know the contents of letters and packages put into the post-office, nor are they paid like common carriers, a premium equal to the risk. The duty of a postmaster is to convey intelligence and news from one part of the country to another, with all convenient despatch, and that too through a great variety of hands and offices, all of whom are equally concerned in like manner in forwarding this intelligence, public and private, over which he has no control. It was admitted, that if any person having the immediate care of such an office, is guilty of omission or neglect in the office, or if due care is not taken of a letter or packet, such person is liable, on the ground that every man who undertakes a public trust, ought to execute it faithfully; and if it appears that he does not exercise due care and diligence, then he is liable. But it did not appear in the present case, whether this accident happened while this letter lay in the post-office at *Columbia* or on the road, or in any other post-office or place after the mail was closed at *Columbia*. The letter itself went safe and in due time, according to the regulations of the post-office, though it unfortunately happened the money or contents had been purloined somewhere, but where was the question. If while the letter lay in

1 *Salk.* 17.

the office at *Columbia*, then it was admitted *Chapman* was liable; but as there was no proof of that fact, it was said he was not liable.

Against this motion it was strongly urged, that the office of postmaster was an office of high trust and confidence, as a great portion of the commerce of the world was carried on through the medium of post-offices; and if they were to be exempted from responsibility, innumerable frauds might be committed.

They have the appointment of all their own deputies and inferior officers, and should appoint none but such as were trust-worthy; and if they turn out otherwise, they are answerable for it. Every principal was liable for the misconduct of his deputy, in every public department.

In answer to the argument, "that a post-office is only an office of intelligence, and not of insurance, and that no premium was paid," it was said, that the payment of a premium is not necessary to create a responsibility, for that every man who undertakes to carry goods or money, was liable to an action, be he common carrier or not; and whether a premium is paid or not. And the reason why the law makes him liable is, that a particular trust was reposed in him, to which he has concurred by his assumption, or taking upon him to execute it; and if any injury arises by his neglect, he is liable in damages. And for this purpose, the case of *Coggs* and *Barnard* was relied on as strong in point; where it was held by all the Judges, who delivered their opinions *separatim*, that if a man acts by commission *gratis*, and in the execution of it behaves himself negligently, he is answerable; as he puts a fraud upon the plaintiff by being negligent, and that it was a breach of trust undertaken voluntarily, which is a good ground of action.

2 Ld. *Raym.* 909. 3 *Will.* 447.

The Judges, after considering this case, felt and acknowledged it was an important one to the community.

Bolan v. Williamson & Chapman.

That a post-office was an office of great trust and confidence, in which the commercial interests of the union were deeply concerned; and unless great punctuality was observed, the inconveniences and injuries to the public would be beyond all calculation. But important as the case was, this and every other of the like kind must be governed by its own circumstances. Wherever a postmaster is guilty himself of any negligence or misbehaviour, he ought to be made liable in damages; but it would be hard and unreasonable to make him responsible further than for his own misconduct, especially where such a number of persons are necessarily concerned in the post-office department.

In the present case, it appears from the evidence offered, that *Williamson* was from home when the letter in question was lodged in the post-office; that he knew nothing about it. It would not, therefore, be very consistent with justice to make him liable for a thing he knew nothing about, or had no knowledge of. The letter enclosing the money was delivered to *Chapman*, the deputy in the office, who took charge of it; and it has not appeared that the money was taken out of the letter after it left the post-office at *Columbia*, or that the mail was robbed, or that any accident happened on the road to *Charleston*.

The presumption is, therefore, that the money must have been taken out of the letter by some one who had access to the office before the mail was closed, as the money was not in the letter when delivered out of the post-office in *Charleston*; and although there is no imputation against *Chapman's* honesty, yet by his negligence it might have been lost or taken out by some dishonest person who got admission by some means into the post-office. Deputy-postmasters are subsisting substantial officers, and are liable for all their *nonfeasances*, and *misfeasances*, and an action may be maintained against them for all omissions and neglects in office. And the case cited from *Salk.* 17. is strong in point; where it is expressly laid down, that a deputy is

liable; so also in 3 *Will.* 447. And it is not necessary that a premium should be paid to make him liable; for whether it be paid or not, the law will charge him, upon his general undertaking to carry it safely, as was determined in 2 Ld. *Raym.* 909. after solemn argument, by all the Judges; likewise, 3 *Will.* 446. They were, therefore, all of opinion, there was no evidence in this case to charge *Williamson*, the principal in office, but there was nothing to prevent the plaintiff from going on against *Chapman*, the deputy, if he thought proper.

Rule for new trial made absolute.

All the Judges present.

DUNCAN M'FARLANE *against* WILLIAM HENRY HARRINGTON.

Columbia, 1804.

SPECIAL action on the case, commenced in *Chesterfield* district, for causing plaintiff to be imprisoned and tried for murder, without probable cause of prosecution, in *North Carolina*.

Where papers purporting to be records and proceedings in a cause in *North Carolina*, are transmitted *without the seal of the court in which they are pending*, or *a certificate that such court hath no seal*, they cannot be received or read in any of the courts of *South Carolina*.

To this declaration there was a plea in bar, setting forth that there was a suit depending in *North Carolina*, by the plaintiff against defendant, for the same cause of action, which was still undetermined; and in support of this plea, sundry papers and certificates, purporting to be the record of the proceedings of one of the supreme courts of record in that state in the said cause, were produced and offered to the court. To these papers and proceedings, Mr. *Falconer*, as counsel for the plaintiff, took several exceptions, and contended that they should not be read, as, among

A certificate of a judge on a separate piece of paper, and not on the proceedings themselves, is irregular.

M'Farlane v. Harrington.

other things, they were not certified in the manner directed by the act of congress, in that case made and provided.

When the presiding Judge, (GRIMKE,) having great doubts upon the subject, directed that they should all be brought up to this court, for the opinion of all the Judges on the point of their regularity and admissibility in the courts in this state. Which being inspected and examined, it appeared that they were not certified *under the seal of the court where the suit was depending*, *nor was* it certified that such court was *without a seal;* and further, that the *certificate of the Judge was not on the proceedings themselves*, giving them authenticity, *but on a separate piece of paper*, which formed *no part of such proceedings*.

For these defects and irregularities, the Judges were unanimously of opinion they could not be received as evidence of the commencement and existence of a suit between the same parties, for the same cause of action.

But in order that defendant should not be deprived of the benefit of his plea, that day should be given, and time allowed to him, to send for, and obtain the necessary documents properly authenticated, agreeable to the act of congress.

All the Judges present.

ROGER SMITH *against* MARY BRISBANE, Executrix of ADAM F. BRISBANE.

Columbia, 1804.

UPON *sci. fa.* to revive judgment in *Kershaw* district.

Amendment is allowable to correct an error in a variance between a *sci. fa.* and the original record, so as to meet the justice of the case before judgment, especiallywhere it appears to be a mere clerical mistake.

Plea, variance between the suit and the original record, inasmuch as the original record produced was against *Adam Fowler Brisbane*, executor of *William Brisbane*, deceased, and the *sci. fa.* in this case was against *Mary Brisbane*, executrix of *Adam F. Brisbane*, omitting the words, "*who was executrix of William Brisbane, deceased.*"

Whereupon the plaintiff moved the court for leave to amend, as it was evidently a mere clerical mistake, which was granted by the circuit court.

The present, therefore, was a motion to set aside this order of the circuit court to amend.

But the court thought it regular and proper to give the plaintiff leave to amend, as even at common law, any error committed in the proceedings, might be amended before judgment. See *Cunn. Dict.* tit. *Amendment.* 2 *Cro.* 627. *Cro. Car.* 33.

Motion refused.

All the Judges present.

Columbia, 1804.

THOMAS SUMTER *against* JOHN WELSH.

Where there is a defect of title or of the quantity of land, it may be given in evidence against plaintiff's demand, upon a bond or note, &c. given for the consideration money before eviction.

Any grant taken out on an elder survey, within six months after the elder survey is made, is null and void; as every man has six months allowed by law to take out and perfect his grant, after he runs it out.

ASSUMPSIT on a note of hand. Verdict for defendant in *Lancaster* district. Motion for new trial.

The note on which this action was commenced, was given for the consideration money of a tract of land, 263*l.* 10*s.* 8*d.* sterling.

Defendant pleaded in discount, under the terms of the discount act, sundry payments, and also a deficiency of 800 acres of land, part of the tract sold him, which had been taken away from him by an elder survey.

On the trial, the plaintiff contended, that this deficiency, or the value of it, could not be regularly set off or given in evidence against the defendant's note of hand; for that, in the deed he had executed to defendant, there was a general warranty of title; and until there was a recovery against defendant by a title paramount, and an eviction in consequence of such recovery, he was not liable on his warranty. And if he was not liable on this warranty until eviction, then it could not be set off against his demand on the note, as he would always remain answerable on his covenant in the deed. Plaintiff further argued, that the grant set up in opposition to his, was a younger grant; consequently his was the preferable claim in point of law, agreeable to a well known maxim, that the eldest deed and last will are always to be preferred.

For defendant, in reply, it was admitted, that no action of covenant would lie for a breach of warranty in the deed, to recover back the consideration money and damages for the breach of it, until an eviction by title paramount. Yet it was contended, that it was competent and legal for defendant to defend himself against any demand for the consideration money which the plaintiff might make against

him for the value of the land he had lost, on the ground that the consideration itself had failed for which his obligation was given, *pro tanto;* and that a great number of cases had been determined on these principles in our courts of justice. That with respect to the plaintiff's grant being older in date than the one which took away the lands sold to defendant, the fact was also admitted; but it was located on an elder survey, and the time for taking out the junior grant had not expired, before the plaintiff had intruded himself, and illegally obtained the grant, which the first survey gave to the grantee who took away the land, which were matters of record, and apparent on the face of the grants, and the surveyor-general's plats and certificates annexed to them; so that even if eviction had been necessary in a case of this sort, the *evidentia rei* was tantamount to an eviction by title paramount.

The jury, under the direction of the presiding Judge, (GRIMKE,) after making the allowances for the different sums paid by defendant on his note, and also for the value of the land taken away by a prior right, gave a verdict for the defendant for —— dollars, which had been overpaid by him, after making what they conceived the fair deductions for the land taken away at a *pro rata* valuation for it.

This was a motion for a new trial;

When, after due consideration, the Judges refused it on both the principal grounds urged by the defendant for it.

1st. Because it had been determined over and over again, that wherever there has been an evident failure in quantity or quality of lands sold, and the defendant is sued for the consideration money, he may defend himself against such claims before eviction, *on the ground that the consideration has failed;* which is an equitable defence, but of late has been permitted in our common law courts, as well as in a court of equity, in order to prevent a circuity of actions, and to bring about speedy justice between the parties.

Sumter v. Welsh.

2d. With respect to the dates of the two grants, the act is very plain and explicit on this head. It declares that every man who makes a survey, shall have six months to take out and perfect his grant, and that any other grant, (though older,) taken out for the same land within that time, shall be considered as null and void.

Rule for new trial discharged.

All the Judges present.

Columbia, 1804.

THOMAS CARSAN *against* ELIJAH RAMBERT.

The value of a horse lent to stake at a gaming-table, may be recovered by the lender from the borrower, if actually delivered over, though no contract is good for money or other property lost at play.

CASE, on a summary process, in *Edgefield* district. Decree for defendant. Motion to set aside this decree.

This was a case in the summary jurisdiction of the court of common pleas, for the value of a horse, 70 dollars, lent by *Carsan*, at a tavern where gaming was going forward, to stake on a game of cards. The defendant lost the game, and the winner took the horse off, by the consent of both the parties to this suit. Some time afterwards, the plaintiff applied to defendant for payment of the value of the horse, which he estimated at 70 dollars; but defendant refused to pay it, alleging that it was a gaming debt, and that he was not bound in law to pay it. Whereupon he brought this suit.

Upon the trial, all the facts were admitted, and the case turned upon the legal responsibility of the defendant to pay this debt.

For the defendant it was said, that the lender was present and saw the game going forward, and lent the horse

for the express purpose of staking on the game, as all his money was gone; which was an encouragement to the defendant to go deeper into the play, and therefore that this ought to be considered as a gaming debt, and put upon the footing of money lost at play, as much as if the plaintiff had won so much from the defendant himself. And it is clear that all contracts and securities for money lost at play, were void both by the *British* statutes made of force in this state, and by our own act of assembly.

On behalf of the plaintiff it was said, that this was not only a very dishonourable, but a very unjust, conduct on the part of the defendant, to endeavour to defraud the plaintiff out of property he had generously lent him, to enable him to retrieve his losses in a run of bad luck which he had experienced in the course of the day; and that neither the *British* statutes, nor our act of assembly, had any bearing upon a loan of this kind. It was admitted that if a man loses money at play, and does not stake it down, or deliver it over to the winner, or if he stakes at hazard any other species of property which is not immediately delivered up to the winning party, that all promises, contracts, agreements and securities, made or entered into for payment or delivery of the same at any future time or period, are made absolutely null and void by the statutes and acts against gaming; so that no action can ever be maintained on them.

But if such money is actually paid or delivered up at the time to the person winning, there is no law to prevent him from taking it off; nor is there any law to prevent a third person not concerned in the play, from lending money to either of the gamesters, at the time and place of play. That this, therefore, could not be considered as a gaming debt, or as property lost at play, but a loan made to defendant in time of need, and in the hour of difficulty;

Carsan v. Rambert.

and as such, he ought in honour and good conscience, to pay the plaintiff the value of the horse so lent him.

The presiding Judge, after hearing counsel, thought that this was a case which came under our act of assembly, passed in 1802, which declares all such games at taverns, inns and public houses, &c. unlawful; and inflicts a fine on persons playing and betting, and on the tavern-keepers permitting such games to be played in their houses. And it authorizes and enjoins it as a duty on all magistrates, to bind over all such parties so offending, to answer for such offences against the public morals, at the next court of general sessions of the peace, &c. Viewing it, therefore, as a public offence, and considering the plaintiff as participating in it by lending property to bet at this unlawful game, he gave a decree for the defendant.

This, therefore, was a motion to rescind and set aside this decree, as against law.

The Judges, having maturely considered the case, were of opinion, that the decree was not warranted by law, and that it should be set aside. For although the act of 1802 prohibits gaming at taverns and inns, &c. and inflicts a penalty on the parties concerned in gaming and betting, as well as on the tavern-keepers, &c. yet it is silent as to all contracts made by other persons, though at the time and place where such gambling is going on. If then there was no law to prohibit the plaintiff (who does not appear to have been concerned in playing or betting) from lending, or the defendant from borrowing, the contract, as between them, was fair and binding on both sides.

The *British* statutes made of force in this country against gaming, and our own act of the legislature, only declares all gaming contracts, and securities for the performing such contracts at any future time, void, and of none effect. They are all silent as to the money lost or won at the time, which is delivered to the winner; and

also as to money lent by third persons, or property loaned to either of the parties, though at the time and place of play.

That in the present case, the horse loaned to the defendant might well be compared to money lent to play with, which, in the case of *Robinson and Bland*, 2 *Burr.* 1082. was determined to be recoverable. They said they could see no difference between the two cases.

Rule for setting aside the decree, and for a new trial, made absolute.

All the judges present.

The STATE *against* AUGUSTINE BUYCK.

Columbia, 1804.

SUSPICION of forgery. *Richland* district. Motion to reverse decision of circuit court.

A person accused of forgery, and admitted to bail, not entitled to his discharge under the *habeas corpus* act, from the prosecution at the 2d court, because he was not in actual confinement; though if he had been confined in prison, the court would have admitted him to bail, if no bill had been found against him.

The defendant had been arrested and taken up on suspicion of forgery, at the instance of the comptroller-general, on behalf of the state; but was admitted to bail on his recognisance, with securities to appear and answer at the then next court of general sessions of the peace, to be held in *Richland* district, to the charge made against him. No bill of indictment was found against him, either at the first or second court after he was bound to answer, owing, as was alleged, to the non-attendance of the witnesses on the part of the state. On the last day of the second court, a motion was made for his discharge from the prosecution, and that his recognisance, and that of his sureties, might be delivered up and cancelled. When, after argument, the presiding Judge (BAY) refused to discharge him from

State v. Boyck.

the prosecution; observing, at the same time, that if he had been in confinement in prison, he would not have hesitated, under the 7th clause of the *habeas corpus* act, to have discharged him on bail. And as the witnesses for the state had not appeared at the second court, he ordered the case to be continued over till the next term.

The present was therefore a motion to reverse the decision of the circuit court, and to order the defendant to be discharged; but the judges, after due consideration, refused the motion, on the ground that a defendant is not entitled, as a matter of right, to his discharge from a criminal prosecution, if he is not indicted and tried at the second court after his commitment. The 7th clause of the *habeas corpus* act evidently alluded to persons who were within the four walls of a prison, that *they* should be discharged from their confinement on bail, or on their own recognisances, according to the nature and circumstance of every case. That this clause did not relate to persons who were not actually in custody or imprisoned, or who were out on bail.

With respect to continuing causes, the court observed, that in many cases where the witnesses for the state could not attend at the first or second court, there might be a failure of public justice, if this was not done: and for that reason it had been the constant practice to do so; but at the same time it was the duty of the court to take care that criminal causes should not be unreasonably protracted or delayed.

Rule to reverse the decision of the circuit court discharged.

WILLIAM ROWE, Esq. Sheriff of *Orangeburgh* District, *ads.* THE STATE.

Columbia, Nov. 1804.

The governor's pardon will not discharge the moiety of a fine for negro-killing, which goes to the informer, although he may remit the moiety which goes to the state.

THIS was a case upon a rule on the sheriff of *Orangeburgh* district, to shew cause why he had not paid over the moiety of a fine for killing a negro by undue correction, 25*l.* sterling to the informer who carried on the prosecution against a defendant, one *James Kelly*, who had been convicted of the offence.

In this case the defendant *Kelly* had been convicted of the above offence by a Jury of *Orangeburgh* district, and fined by the court 50*l.* sterling, agreeably to the terms of the negro act; one moiety whereof goes to the state, and the other to the prosecutor or informer. The solicitor, Mr. *Colcock*, had directed the clerk of the district court to issue an execution to the sheriff, for levying and collecting this fine, together with the costs of the prosecution. The sheriff upon being called upon by this rule to shew cause why the money had not been collected and paid over for the use of the state, and also to the informer, agreeably to the act, produced the governor's pardon for the whole, as well for the share or moiety which went to the informer, as for the other moiety, which went over to the state; when the presiding Judge (BAY) made the rule absolute against the sheriff, as to the moiety which went to the informer, and all the costs and charges, on the ground that the governor had no right to intermeddle with the moiety which went to the prosecutor, any more than he had to release money received on a bond or note, by a third person, in the court of common pleas.

This was therefore a motion to reverse the decision of the circuit court at *Orangeburgh*, and to discharge the rule against the sheriff. When, after due consideration, the judges were unanimously of opinion, that the governor had no right to remit any fine or forfeiture specifically appropriated, or

Rowe v. The State.

otherwise directed by law. That the 7th section of the 2d article of the constitution of the state, was express and positive on the subject. The words are, "he shall have power to grant reprieves and pardons, &c. &c. and to remit fines and forfeitures, *unless otherwise directed by law.*" These latter words are restrictive of the powers given to the governor on this head, and interdict him from remitting or interfering with any fine or forfeiture whatever, given by law, or appropriated or set apart for any specific purpose whatever; but they leave him at liberty to remit and discharge all unappropriated fines and forfeitures which he may think proper.

With regard to the fees due to the officers of the court, they were vested rights by law, as much as the moiety of the fine to the informer or prosecutor, and equally beyond the reach of the governor's power of remission or releasing.

The rule to reverse the decision of the circuit court was therefore discharged, and the rule against the sheriff of *Orangeburgh* confirmed, to pay over the moiety of the fine, 25*l.* sterling to the prosecutor, and all the costs of the prosecution to the officers of the court.

N. B. This article in our constitution is conformable to the old principles of the common law, which allows the king the right of pardoning forfeitures, &c. but not so as to affect private rights properly vested in third persons by law. The crown cannot defeat an interest legally created. 2 *Durn. & East*, 569.

A TABLE

OF THE

PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

A

ABANDONMENT.

The insured have a right to abandon ship and cargo upon capture, though not obliged to do so immediately after, if there is any probability of recovering the property from the captors. It is not too late for the owners to make their election, after a decision in a court of admiralty, on the subject of prize or no prize. Where an appeal is made by captors, from a decree for restoration of ship and cargo to claimants, on giving security for the appraised value thereof, this is not to be considered as a final decision in regard to the property, only an interlocutory decree, which may be compared to property seized for rent, at common law, and replevied. The delay and uncertainty of final decision, are risks *within the meaning of the policy*, 307

ACKNOWLEDGMENT.

The bare acknowledgment of the justness of a debt by a defendant, where no sum is mentioned, is not sufficient to warrant a jury in finding any *specific sum*, 412

ACTION.

1. Every man is entitled, as a matter of right, to a 2d action to try title to land, if such 2d action is commenced within two years after the determination of the 1st; but not afterwards, 115
2. In a special action on the case, a defendant shall be answerable for the price of a negro boy killed in riding a horse race, where the master or owner's consent is not previously obtained, 464
3. An action of *assumpsit*, for money had and received, will lie by a mortgagee, for money paid over by the sheriff to a judgment creditor by mistake, not knowing of the prior mortgage on the land sold to raise the money, 80

ADMINISTRATOR.

An administrator's sale of any part of the goods and chattels of the intestate, for payment of debts, &c. is good and valid, although such administrator may not have obtained the permission or order of the ordinary, to make such sale, 321

ADMINISTRATION BOND.

1. Where an administration bond has been made payable to the judges of a county court, (which has been abolished,) the suit should be in the name of the ordinary of the district, who has succeeded to the office of ordinary, and not in the name of officers not in existence, 519
2. In debt upon an administration bond, a party entitled to a distributive share of an intestate's estate, cannot recover more than his proportion of the proceeds of the estate returned in the inventory, and sold, and his proportion of damages for the value of such parts as were omitted to be inserted in the inventory by the administrator, 542

AGENT.

A mere agent, who receives and pays away money to his principal, or to his use, without notice, is not liable in an action for money had and received to plaintiff's use, although the principal himself might be made responsible to a third person, who was entitled to the money, 84—86

See Principal & Factor.

ALIEN.

If an alien is drawn to serve as a juror in a case for murder, it is a good cause of challenge before trial; but if he be permitted to be sworn by the prisoner, it is too late, after trial and conviction, to make it a ground for a new trial, 150

APPEAL.

All appeals must be made to the constitutional court established for that purpose; which court has no original jurisdiction, 407

ANCESTOR AND HEIR.

Where an ancestor dies, after a supposed offence against the state, and before the act of confiscation, his heir at law shall take by descent, notwithstanding the confiscation act, vesting the ancestor's land in the state, 536

See Heir at Law; also, Confiscation Act.

ARBITRATORS.

1. Where arbitrators take upon themselves to make an award on other matters than those submitted to them, it is a good ground to set aside such award. No parol testimony should be allowed to vary or alter the import of the terms of submission, 94

See Award; also, p. 370.

2. Arbitrators not guilty of misconduct, their award not to be impeached, 450

ARREST OF JUDGMENT.

No motion will be heard in arrest of judgment in a criminal case, after conviction, where a defendant has been bailed, in which corporal punishment is either certain or probable, unless he be personally present in court, ready to hear the judgment of the court, and to be taken into the custody by the sheriff, in order to receive the punishment to be inflicted, for the offence, 34

ASSAULT.

1. Upon not guilty pleaded to an indictment for an assault, it is irregular to permit extenuating circumstances to be given in evidence to a jury; they ought to be submitted, on affidavits, to the court, 67
2. Witnesses may be compelled to come forward by *subpœnas* on the sentence day, to give testimony, as well as on the trial before a jury, *Ib.*

See Witnesses.

ATTACHMENT.

1. The first writ of attachment lodged in the sheriff's office, is entitled to a pri-

ority of lien on the absent debtor's goods, though another writ is first served on a garnishee. Where priority of action becomes necessary to give a right to the party, the very hour of the day, or even minute, may be shewn. The writ is considered as the commencement of the suit, and the delivery to the sheriff as the time of the commencement of it, 8

2. Attachments issued by magistrates, under the act of 1788, are to be returned to the prothonotary's office, and proceeded in, agreeably to the old attachment act, 124

3. Under the attachment act, the consignee of a ship has a right to retain, as creditor in possession, for the amount of his demand, 224

See Consignee.

4. It is the writ of attachment, and not the judgment obtained upon it, which gives the lien on the absent debtor's property, 272

5. If a declaration in attachment is filed after the expiration of the two months mentioned in the act, and before the end of the year and day, it will preserve the first attaching creditor's lien, although another creditor gets the first judgment, 279

6. A judge's order for the substitution of a new writ of attachment in lieu of an old one lost or mislaid, is tantamount to an order for further time to declare, *ib.*

AWARD.

Where arbitrators have been guilty of no misconduct, nor committed any great mistake, the court will not open the award, but hold the parties to their decision, 450

B

BAIL.

1. Bail is not allowable in any case after conviction for an offence which subjects the offender to corporal punishment, 34

See Contempt; also *Habeas Corpus*.

2. A man committed on a charge of forgery, is entitled to bail at the second court, under the *habeas corpus* act, though not entitled to a discharge from the prosecution, 563

BILL OF EXCHANGE.

1. Where a man draws a bill of exchange on himself, no damages are recoverable. It is like a note of hand after he accepts it, 377

2. Where the original of a bill of exchange, which has been duly protested, is lost, proof of its existence and loss will justify the court in permitting a notarial copy to be given in evidence, 495

BLOCKADE.

1. A breach of blockade under the treaty with *Great Britain*, must consist in a second attempt to enter a blockaded port, after being duly warned away. The parol declaration of a captain, that he intended to enter, is not sufficient ground of capture, without an actual attempt for that purpose, 388

BOND.

1. Where a bond is given for a consideration which fails, such want of consideration or failure may be given in evidence in a court of common law, to defeat the bond, 76

2. A bond given to a sheriff, to indemnify him for not returning an execution, is void, 67

3. A bond of indemnity may be put in suit by the obligee, the moment the breach happens in not performing the condition of the bond, who is not obliged to wait till he is sued and compelled to pay the money, 145

BOOKS OF ACCOUNT.

1. Merchants' and tradesmen's books of original entries, are good evidence to prove an open account to a jury, under the county and precinct court act, 172

2. And such proof may be made by the merchant or tradesman himself, by swearing that the book so produced, contains the original entries; but the entries are the evidences of the items in the account, *ib.*

C

CAVEAT EMPTOR,

Is a good general rule at sheriffs' sales. The chance of a wife's dower after her husband's death, or of her surviving him, is no good reason why a purchaser should not pay the purchase-money bid for a house and lot at a sheriff's sale, who sells only the right of the defendant in the action, 169

See Sheriffs' Sales.

CHALLENGE.

Where a prisoner or defendant has a good cause of challenge to a juror before trial, and will not avail himself of that privilege before he is sworn, it is too late after trial and conviction to make it a ground for a new trial, or in arrest of judgment, 153

See Alien; also, Juror.

COMMISSIONS TO EXAMINE WITNESSES.

Where the examination of witnesses under commissions sent abroad, are transmitted through the channels of the post-offices without any suspicions of fraud about them, they ought to be opened and read in evidence, although there be no indorsement on them of the delivery into the post-office in another state or county, by one of the commissioners who took the examinations, on the ground that fraud shall not be presumed in the execution of a trust by men in whom all the parties had confidence, and who had no interest in the question, one way or the other. On the contrary, it is fair to presume that all has been done which ought to have been done on such occasions, 312

CONFISCATION ACT.

This act does not affect the right of an heir at law, who took by descent, after his ancestor's death, before the passing of the act, 536

See Ancestor, and Heir at Law.

CONSIDERATION.

1. Failure of consideration *in toto*, is a good ground for a recision of a contract. But if the injury be only partial, then for an abatement in price, in proportion to the nature of the injury. 76
2. Failure of consideration is a good defence against a bond given for land, without eviction by title paramount, if a better title is shewn to be in a third person, *ib.*
3. It is a good discount against a note of hand where part of a tract of land is taken off, by an elder survey, to the amount of the value of the land so taken away, 558

See Contract.

CONSIGNOR AND CONSIGNEE.

A consignee of a ship and cargo has a qualified property in both, and a constructive possession in law, the moment she comes into port; and has a right to retain, as creditor in possession, under the attachment act, for all his just claims and demands, 224

CONSTITUTION.

On a fair construction of the 3d section of the 10th article of the constitution of the state of *South Carolina*, it has been determined that all points of law, arising in the upper division of the state, should be argued and determined in the court of appeals at *Columbia*; and all points of law, &c. arising in the lower division of the state, should be argued and determined in the court of appeals at *Charleston*; and that parties should not have it in their option to harass each other, by taking their cases to the one or other of these tribunals, as they might think proper. *3d sect. Const. 10th art.* See also, page 467

See Courts.

2. In the exercise of the right of construing laws, conformably to the terms of the constitution, the judges

claim no judicial supremacy; they only act as the administrators of the *will of the people*, who framed the constitution, and who have thought proper to limit the legislative powers, which will, so expressed, *is paramount* to that of *their representatives*, expressed in *any law*, 61, 62

See Judge.

CONTEMPT.

1. A justice of the peace, sitting in his judicial capacity, has a right to commit a man for a contempt of his office or authority, offered in his presence, and his warrant of commitment, under his hand and seal, is the highest evidence of such contempt, 1

See Witness.

A justice of the peace sitting and acting in his judicial capacity, forms a court, and it is an incident to all courts, to commit for contempts, 7

See Justice of the Peace.

2. A person taken on an attachment, for a *contempt*, out of the court of chancery, is not bailable under the *habeas corpus* act, 182

See tit. Bail; also *Habeas Corpus*.

CONTRACT.

1. Misrepresentation in any essential part of a contract, will defeat it; as where a fine stream of water and mill-seat, were represented on a plot, at the sale of lands, in the midst of a fine timbered country, which in fact, turned out to be a dry gully, three fourths of the year, 11
2. All contracts must be good or bad at their original creation, and must not depend upon subsequent contingencies; as where services were performed gratuitously at first, they shall not afterwards be converted into a charge, upon a difference between the parties, 101
3. A contract made in a foreign country, is to be governed by the *lex loci*, if it was made with a view of being performed there; but if made with a view of its being performed in another country, then the law of the country where it is to be performed should be the rule, 377
4. In all contracts, it is a good general rule, that soundness of price warrants a sound commodity; but where a purchaser is fully and fairly informed of all the circumstances, and has a proper opportunity of gaining information, he shall be held to his bargain, though it turn out to be a losing one, 380

Inadequacy of price or consideration, is not a ground of itself, for rescinding a contract, *ib.*

5. On a contract for building a house, *at a sum certain*, where additions and alterations are made in the original plan, the contract shall not be set afloat on that account; but the sum fixed by the contract, shall form the basis of the charge, and the additions and alterations shall form extra charges, at a reasonable valuation, 401
6. On a contract for the sale of rice, which turned out to be damaged when examined at a foreign port; it was determined that it should have been examined in *Charleston*, before it was shipped on board of the vessel, and that the quality of such a valuable staple commodity should not depend upon an examination in a foreign country, but at the place of shipment, 498

A merchant who ships rice without examination, takes the quality upon himself, and runs all risks, *ib.*

CONVOY.

A warranty of sailing with convoy, in a policy of insurance, means sailing *all the way* with convoy, unless compelled by stress of weather, or unavoidable accident, to deviate from the true course of the voyage, 237

See Warranty.

COPARTNER.

1. The private debt of one copartner, cannot be set off against the demand of the copartnership, 146
2. The acknowledgment, by one copartner, of the receipt of an account cur-

rent against the copartnership, and of the justness of the balance due, is binding on the other copartners, although it be after the dissolution of the partnership; it not being a new contract, but only evidence of a subsisting debt against the former copartnership, while it existed, 533

See Merchants and Copartners.

CORPORATION.

1. A corporation cannot make a return to a writ of attachment on oath; it must be made under the corporate seal, and signed by the intendant or chief magistrate of the city or other body politic, 10
2. A member of a corporation may maintain his action against the corporate body for a just demand, 109

COSTS.

1. Where executors or administrators sue in right of their testators or intestates, they pay no costs; but where they are defendants, they are liable, and judgment shall be *de bonis testatoris*, 166
2. No costs are allowed against an informer or prosecutor in a *qui tam* action or prosecution on behalf of the public, 323
3. No costs are allowed against an executor or administrator on a nonsuit, though they may be liable in some cases on a *non pros.* where delay or *laches* is imputable to them, 399

See Executors.

They may even discontinue without costs, if they discover, after the suit is commenced, that they cannot maintain their action, *ib.*

4. Where costs are ordered by the court to be paid by either party, while a cause is *in transitu*, the party who is to pay, ought to call on the opposite party's attorney, and demand a bill and tender the money. But if the party who is to receive, is not ready with his bill, then it is the duty of the opponent's attorney to go and tender his bill and demand the money. Calling at the clerk's office is not sufficient, because the attorneys on record represent the parties, 431
5. In an action of *assumpsit*, where a party plaintiff recovers less than 20*l.* sterling, he shall have no more costs than are allowed on a summary process, unless the demand be reduced by discounts; as the defendant, if he pleases, may resort to his cross action, 433

All payments made in cotton or other produce of the country, shall be credited at the current value in the districts where the party lives on the day of delivery, which are not to be considered as discounts or mutual debts, but payments *pro tanto*, 434

COVERTURE.

Coverture should be pleaded in abatement: it is too late to take advantage of it, in order to set aside a judgment of several years standing, where a woman carried on business in her own name, and on her own account for a number of years as a sole trader, 333

See Sole Trader; also Judgment.

COVENANTS.

1. In mutual covenants, payment or performance by one party raises an obligation on the other party, to perform those on his part, without a demand for that purpose, 91
2. An instrument in the form of a penal bond, for 76 negroes, conditioned for the delivery of 38 negroes, to be construed into a covenant to deliver 38 negroes, and a jury may give damages equal to their value, 108

COURTS.

1. County courts abolished in *South Carolina*, and supreme courts of judicature in every district, created in lieu of them, 235
2. A justice of the peace, sitting in his judicial capacity, constitutes a court of inferior jurisdiction, and he may commit for contempts offered to his authority, 8

See Contempts.

3. Courts of appeal are established in this state by the constitution, and are to sit alternately at *Columbia* and *Charleston*, twice in every year at the conclusion of the circuit courts, in order to hear and determine all points of law, &c. &c. coming up from the circuit courts, &c. 467

See Constitution.

They have no original jurisdiction.

D

DAMAGES.

1. Upon the execution of a writ of inquiry, some damages, however small, must be given by the jury, 405

See Writ of Inquiry.

2. Damages, although high, not a ground for a new trial, in violent assaults, 416

See New Trial.

3. Damages, where they are trifling, in a most outrageous assault, the court will, in such a case, grant a new trial in its discretion, although it is not usual to grant new trials for smallness of damages, 466
4. In slander cases, the court will very rarely grant new trials for high damages, unless they are far beyond the bounds of moderation, 204

See Slander.

DEBTOR INSOLVENT.

1. Where a man takes the benefit of the insolvent debtor's act, in the inferior court of the city of *Charleston*, it entitles him to a discharge from his suing creditors, in the court of common pleas, 104
2. An insolvent debtor not to be discharged where fraud is suggested, until that point is determined either by the court or jury, 147
3. Mere allegations of fraud are not sufficient to deprive a man of the benefit of the act. Affidavits containing the facts must be filed, *ib.*

In cases not complicated in their nature, the court will determine on the affidavit or suggestions in a summary manner, 147

But where they are intricate or difficult, the court will send them to a jury to be tried, *ib.*

DECLARATIONS.

1. In a declaration of slander, if some counts are good, and others bad, a general finding will support the good counts, 204
2. If a declaration is filed by the plaintiff within a year and day from its return, it is good; but not afterwards, as the writ, after that time, becomes discontinued, 414

See Practice.

DECREE.

1. A decree or sentence in a foreign court of admiralty, as *lawful prize* or as *enemies' property*, is conclusive against all the world, 362. 367
2. Where a decree is doubtful or of an ambiguous or uncertain nature, or where the libel is on one ground, and decree on another, or the like, it will justify the court in opening the proceedings, and permitting evidence on both sides, 362

See also 388.

DEED.

A deed not recorded within six months after its date, does not lose its priority to a subsequent judgment, in districts where county courts were never established, 80

See Mortgage.

DIES DOMINICUS.

The Lord's day, commonly called *Sunday*, not a day in law; *non est dies juridicus*. If a verdict be delivered in on *Sunday* morning, after 12 o'clock on *Saturday* night, it will be a good ground for a new trial, 332

DISCOUNT.

1. Torts and trespasses, &c. are not discountable under the discount act; only money transactions or mutual debts, accounts, or other matter arising *ex contractu*, and not *ex delicto*, 351
2. In an action on a bond against one joint obligor, any fair discounts, which the the other co-obligor may have against the plaintiff, may be set off against the bond, 475
3. An assigned bond is a good discount against another; but if the plaintiff can shew that the bond so assigned over has been paid off by a receipt, the statute of limitations will not run against such receipt, 481

See Statute of Limitations.

DISTRIBUTION.

The distribution of intestates' estates among collateral relations, is not to be carried down further, by the act of 1791, abolishing the rights of primogeniture, &c. than the children of the brothers and sisters of the intestate, 293

DOWER.

1. The widow of a man whose estate has been confiscated, is notwithstanding entitled to her dower in his lands, 20
2. Where the commissioners in a writ of dower, assign to a widow more than by any known rule of law she is entitled to, the proceedings will be set aside, 449

DURESS.

Duress of goods, under some circumstances of hardship, will avoid a bond given to procure their release, or to gain a repossession of them, 211

E

East Bay Street, in the city of *Charleston*, authorized to be laid off by act of assembly, without making any compensation to the lot owners over which it runs, 38

See Highways.

EJECTMENT.

The old action of ejectment changed into the action of trespass, or rather the action of trespass to try title to land, substituted in the room of the old action of ejectment, in which the plaintiff can recover mesne profits in addition to his right to the land, 115
See also, p. 154.

ESCAPE.

Upon an action for a negligent escape, on the part of the sheriff's deputy, who had taken a defendant on a *ca. sa.* the debt becomes the debt of the sheriff; but if the defendant is taken on mesne process, where damages are unascertained, the jury may give whatever sum they may think reasonable, or they may take the insolvency of the debtor into consideration, 395

EXECUTION.

1. The time for renewing an execution, or the year and day, so as to render a *sci. fa.* unnecessary, is to be computed, not from the time the first one was lodged in the sheriff's office, but from the last day it had to run in court, 126

See Year and Day.

2. Where a levy has been made by a sheriff, by virtue of an execution of *fi. fa.* within the year and day, he may sell personal goods or chattels after the expiration of that period, or even after he is out of office, 126

See Sheriff.

EXECUTOR.

1. An executor is liable to pay back money received by him from a sheriff, through mistake, for the use of testator's estate, where it is paid by the sheriff under a judgment and execution, not knowing a mortgage on the premises prior to the judgment, 85

2. Where executors or administrators sue in right of their testators or intestates, they pay no costs; but where they are defendants, they are liable *de bonis testatoris*, or out of the effects of the intestate, 166
If, however, executors or administrators sue for a trespass or conversion, after the death of the testator or intestate, where they need not name themselves as executors or administrators; or for a cause of action of which the testator or intestate was not conusant; in such cases they shall be liable for costs if they fail in their actions, or become nonsuited, *ib.*

See Costs.

3. Executors not liable for costs on a nonsuit, (though they may be liable on a *non pros.* where delay is imputable to them.) They may even discontinue without costs, if they discover that they cannot maintain their action, 399

EQUITY COURT.

A court of equity can never be considered as extinct, as long as there is one chancellor surviving, capable of performing any of the duties of such court, 182

EVIDENCE.

1. Circumstantial evidence, or a well connected train of circumstances proved by clear and unequivocal testimony, may be given in proof to a jury, as presumptive evidence of a fact, which could not have happened, unless such fact had pre-existed, 190
2. The discovery of new evidence after trial and conviction, not a good ground for a new trial, 267

See New Trial.

3. Newspaper advertisements not proper evidence to be sent to a jury, unless in cases of slander, libels, or the like, 492
4. Where there is a witness to a bond or note, his hand-writing ought to be proved, before the hand-writing of the obligor, or maker of the note or bond is proved, 606
Sed Qu.? A subsequent decision under the act of 1803, has altered the above. *See* the case *post*, in which it was determined that it was not previously necessary to prove the hand-writings of the witnesses.
5. Where a jury, in a criminal case, find without, or contrary to evidence, and convict a man of an offence which may subject him to corporal punishment, the court will, upon the report of the judge who tried the cause, without further argument, order a new trial, 520

See New Trial.

6. Parol evidence may be admitted on a trial to show the real situation of lands, or to explain a mistake in the grant; as where lands were said to lie on the waters of *Broad River*, instead of laying on the waters of the *Catawba River*, 539

See Hening & Munford's Virginia Reports, 1st vol. p. 177.

F

FACTOR.

1. A factor has no right to take up goods in the name of his principal from a merchant, without a special order for that purpose, so as to charge the principal with the amount, 269
The mere act of the principal or planter, of sending him rice for sale, gives him no such authority; the merchant in such case must look to the factor for his money, 271
2. Where a merchant employs a factor or agent abroad for a special purpose, he shall not be answerable for the acts of the agent further than he acts within the powers, and for the purposes for which he was constituted, 505

FEE CONDITIONAL.

Where a father gives land to his son, and the heirs of his body, which would create an estate-tail in *England*, the marriage of such son, and having

issue, will make the estate a conditional fee; and his alteration of it afterwards, during the life of such issue, will constitute a fee-simple in the purchaser, so as to bar the remainder-man, 397

FEME COVERT.

A *feme covert*, although a sole dealer, is not liable on a bond given by her and her husband, unless she is specially mentioned as such, and so stated in the pleadings, 112
And if after judgment against her on such bond, she be taken on a *ca. sa.* she is entitled to her discharge; as all the proceedings, as to her, are not only voidable, but absolutely void upon the face of the proceedings, *ib.*

FIERI FACIAS.

Fieri facias not essentially necessary to be produced with sheriff's deed on a trial of title to land, 449

FINES AND FORFEITURES.

1. There is no forfeiture at common law for treason till after conviction and sentence; no bill of attainder, or confiscation act, will deprive a widow of her dower, 21
2. All prosecutions for fines and forfeitures, and penalties, under any of the acts of the state, must be commenced or prosecuted within six months after they are incurred, otherwise they are for ever barred, 215
Same point determined, p. 96

FORCIBLE ENTRY AND DETAINER.

An indictment will lay for a forcible entry and detainer against a third person who intrudes himself on land, or enters after judgment against a former intruder; and the sheriff, who has the writ of restitution, may lawfully turn him out of possession, as well as he might have done the original intruder, had he found him in possession of the premises, 353

FORGERY.

1. Forging an order for delivery of goods is a felony within the meaning of the statute. There are no precise words or forms necessary to make such order the subject of forgery. It is sufficient if calculated to deceive and defraud, 262
2. But if an indictment states the offence to be against a *British* statute, made of force in this state, (when in fact there is no such statute made of force,) instead of stating the offence to be against an act of the legislature of the state, it is bad, and will be a good ground to arrest the judgment, 266

See Indictment.

FRAUD.

Fraud is not to be presumed, and where a jury take upon them to presume fraud, where none is proved, the court will grant a new trial, 520

See Debtors Insolvent.

See New Trial.

G

GAMING.

The value of a horse lent to stake at a gaming house, may be recovered by the lender from the gambler, if actually delivered over, though all contracts for money lost at play are absolutely void, 560

GEORGETOWN STREETS.

See Highway.

GIFT.

1. Where a father makes a parol gift of a negro girl to his daughter on marriage, and says he would give her

another, and afterwards actually sends that other; this is a good gift in law, so as to vest the property in the husband, 528

2. But if after all this, the father takes back one of those negro girls, and gives her by deed of gift to a son, who keeps possession of her for 10 years, this will bar the husband's right by the statute of limitations, *ib.*

See Limitation Act.

GOVERNOR.

A pardon from the executive will not discharge the moiety of a fine, which goes to the informer or prosecutor in a criminal prosecution, nor exonerate the sheriff on a rule to bring the money into court, 565

See Pardon.

GRANT.

1. Where there are two grants for the same land, the eldest shall always prevail, (unless it is taken out on land surveyed for another within the six months allowed by law to grantees for perfecting their grants,) and the merits of contending parties previous to the obtaining the grant, are matters for the court of *caveats*, and not for this court, except in the instance above mentioned, 426

2. So where there have been contending claimants for a grant of vacant lands, and the merits have been determined by a court of *caveats*, a common law court will never suffer the merits to be again opened, or any evidence to be offered about such claim, previous to the date of the grant, 454

3. A copy of *an old grant* from the records, is presumptive evidence that a grant once existed: and a great number of years having elapsed, is also presumptive evidence that it has been lost by time or accident; especially where the grantee is dead, and all the witnesses who could have proved the fact, have died, 487
A person under 21 years of age claiming under such grant, shall be allowed 5 years after he comes of age to prosecute his right to the land, 487

See Limitation Act.

4. The loss of a grant, in order to the admission of a copy in evidence under the act of 1803, must be made by the plaintiff himself, and not by a third person, 525

5. By the land act six months are allowed to every grantee to take out or perfect his grant, after a return of the plat and survey into the surveyor-general's office; and any other grant taken out for the same land within that time, or any part thereof, is *ipso facto* void, 558

H

HABEAS CORPUS.

A man admitted to bail on suspicion of forgery, is not entitled to his discharge, under the *habeas corpus* act, from the prosecution, at the second court, if the witnesses for the state do not attend; though if he had been confined in gaol, and no bill of indictment had been found against him, he would then of right be entitled to bail, 563

See Bail.

HEIR AT LAW.

An heir at law shall not be deprived of his right of inheritance by the confiscation act, where his ancestor died between the supposed commission of the offence, and the passing of the act, 536

HIGHWAY.

1. A highway or street may be laid off by the legislature, without making compensation to the owners of land through which it may run, 38

See East-Bay street, Charleston.

2. To constitute a public street or highway, it is necessary it should not only be laid off, but used as such by the public, 282
But nonuser for a great number of years, will forfeit a right to a highway or street, 286

See Georgetown.

3. The remedy for obstructing a street or highway is by indictment, and not by a civil suit or action of trespass, 292

HUSBAND AND WIFE.

Where a husband is absent from his wife seven years or upwards, without her hearing from him during that time, it will excuse her in marrying a second husband, on the ground or presumption that her first husband was dead; and she shall have her share or distribution of her second husband's effects, although it may still be doubtful whether the first husband be dead or not, 476

I & J

IMPARLANCE.

1. In all misdemeanors of every degree, the defendant is entitled to an imparlance as a matter of right, till the next succeeding court, 96
2. An imparlance is not allowed on a summary process, unless on good cause shown, 327

INDEMNITY.

Upon a bond of indemnity, the obligee is not obliged to wait till he is compelled to pay before he sues; he may bring his suit on his bond, the moment after the first breach happens in not performing the condition, 145

INDICTMENT.

1. Where time and place are set forth in the caption of an indictment, with sufficient certainty to a common intent, legal subtleties and niceties are to be disregarded, 451
2. In all prosecutions, on the part of the state, where a defendant or prisoner calls no witnesses, his counsel shall have the privilege of concluding to the jury, notwithstanding the former practice to the contrary, *ib.*
3. If an indictment states an offence to be against a *British* act of parliament, made of force in this state, (when in fact there is no such act made of force,) it is bad, and will be a good ground in arrest of judgment, 262

See Forgery.

INDORSOR AND INDORSEE.

1. The indorsee of a note originally usurious, cannot recover on it, though it come into his hands for valuable consideration, in the way of trade, 23
But he may recover against the indorsor, on a count for money had and received, 31
2. The indorsee of a note is bound to use all due diligence to get payment from the maker, and if he fails, he is bound to give due notice to the indorsor, before he can maintain his suit, 217
But a constructive or presumptive notice, arising from the insolvency of the maker of the note, is not sufficient. Actual notice must be given by protest, or otherwise, *ib.*
3. Indorsement of a note *in part*, and afterwards an indorsement of *the residue*, is bad, and will not charge the indorsor, nor can the holder of it recover against the maker, 324
4. It is not necessary that an indorsor of a note, or an inland bill of exchange, should, in all cases, have notice by protest, of non-payment by the maker or drawer; any other good and reasonable notice is sufficient, 374

INFORMATION.

Public prosecutions by informations have been abolished by the constitution of *South Carolina*, as inconsistent with the true spirit of liberty; and all prosecutions for crimes and offences, are to be carried on by indictments through the medium of the grand juries of the country,

INTEREST.

1. Interest not to be allowed on any judgment founded on *tort* or *trespass*, being actions entirely sounding in damages, and not on contract express or implied, 193
2. Interest is not recoverable upon open or book accounts, or on any unliquidated demand, previous to the finding of the jury, 233
3. Interest is not recoverable on a replevin bond,

See Replevin.

JOINT-TENANTS AND TENANTS IN COMMON.

If one joint-tenant or tenant in common, sues for the whole land, and only proves himself entitled to one third part of it, he shall not be nonsuited on that account, but shall have his verdict for that part which he is entitled to, and the judgment shall be moulded, so as to answer the ends of justice, 457

Same point determined, page 539

JUDGE.

A judge is not liable to an action for damages on account of any opinion determined by him as such, though impeachable for misconduct, 69

JUDGMENT.

1. A judgment is not to be set aside after several years standing for any error or omission, which might have been taken advantage of in pleading, while the cause was *in transitu*, or by motion in arrest of judgment, or for new trial, before final judgment, 333
2. A judgment loses its lien on land after five years' actual possession by a third person, who is an actual occupant subsequent to the judgment, although as between plaintiff and defendant it binds without limitation of time, 338

See Lien; also, Possession.

3. An exemplification of a judgment from another state sufficient to establish the freedom of a negro in *South Carolina*, 485

JUROR AND JURY.

1. Where a jury take upon themselves to examine a witness after they retire into their room to consider of their verdict, it is a good ground for a new trial, 94
2. If an alien be drawn as a juror in a case of murder, it is a good cause of challenge before trial; but if the prisoner allow him to be sworn, it is too late after conviction to make it a ground for new trial, 153

See tit. Alien.

3. Where a juror who sits and finds a bill as a grand juror at a former term, is drawn to serve as a petit juror at the next succeeding term, and is permitted to be sworn; it is too late after conviction to make it a ground for a new trial, or in arrest of judgment, 153
4. The integrity or good conduct of a juror, shall never be called in question in any cause, unless it be upon affidavit made of such misconduct on his part, a copy of which must be duly served on him, before the rising of the court, in order that he may have an opportunity of exculpating himself on oath, if the charge is unfounded, 267

See also same point determined, p. 315.

JUS POSTLIMINIUM.

Negroes or other property taken by an enemy, and returning again within the limits of the country belonging to the former sovereign, is to be restored to the former proprietor, and is secured to him by the *jus postliminium*, which is a part of the national law, paramount to municipal regulations of any individual state, 229

JUSTICE OF THE PEACE.

1. A justice of the peace may commit for a contempt offered in his presence;

and his warrant of commitment under his hand and seal, is the highest evidence of such contempt, 1
He is not liable in a special action for damages, for what he does in his judicial capacity, 6
2. A justice of the peace is not punishable by indictment for any act done by him in his judicial capacity, unless he acts oppressively in his office, 385

See Magistrate.

L

LEGACY AND LEGATEE.

Where lands are specifically devised by a testator, and the executor does not file his plea of *plene administravit*, in order to shew that personal assets are exhausted, or produce personal property to satisfy a judgment creditor, such land may be sold by the sheriff, notwithstanding the specific devise in satisfaction of the judgment, and the purchaser at such sale will be secure in his purchase; and the legatee must look to the executor for his neglect in suffering the land to be sold, 329

LIEN.

The lien which a judgment gives on a defendant's lands, is lost by 5 years' peaceable possession of a *bona fide* purchaser from the defendant, though subsequent to the judgment. But as between plaintiff and defendant, it will remain without limitation of time, 339

See Mortgage.

LEX LOCI.

The law of the country where a contract is made, is to govern the contract where it is to be performed in such country; but if made with a view of its being performed in another country, then the law of the place where it is to be performed, is the governing rule, 377

LIMITATION.

1. Where a writ is taken out against one executor or administrator, where several are qualified, it will not prevent the act of limitations from running against a debt or demand, because such suit is *quasi* no suit, and a second writ against all the executors or administrators, will not cure the defect, where the statute has run out before it was sued out, 194
2. A release, a receipt, or acquittance of any kind, is not within the meaning or intent of the statute of limitations, for they go to extinguish a debt or demand *pro tanto*, which probably might be barred by the statute, 481
3. Persons under 21 years of age have, five years after attaining that age, the right of prosecuting their claim for lands, 487
4. The act of limitations will bar the right of a husband from recovering a negro, given his wife on marriage, where the father takes her back and gives her to a son, unless he brings his action to recover her within four years after she is taken away, 528
5. A limitation of negroes in a marriage settlement to a daughter, and after her death to the heirs of her body, is too remote; it vests in the first taker, and will be liable to the husband's debts, 471

See Marriage Settlement.

M

MAGISTRATE.

A magistrate is not liable to be punished by indictment, unless he acts oppressively in his office. He may commit disorderly persons for contempts offered him while in the execution of his office, and for that purpose may make himself a judge in his own cause, 1
Also, 385.

MAIDENS.

The seducing and deflowering a maid, under 16 years of age, without the

consent of her parents or guardians, subjects the seducer to five years' imprisonment, under the statute of *Philip & Mary*, made of force in *South Carolina*, 418

MANDAMUS.

1. A *mandamus* will lie to compel a corporation to make an assessment on the inhabitants of a city, to pay for a house pulled down to open a street through it, for general use and convenience, 63
2. A *mandamus* will lie to the commissioners of the tobacco inspection, to restore an inspector of tobacco for supposed misconduct, unless the specific charges have been furnished him in writing, in a reasonable time to make his defence, and unless also, the witnesses against him be examined on oath, and their testimony reduced to writing, so that the court may judge of the reasonableness of such removal, 105

MARRIAGE SETTLEMENT.

Where a settlement is made by a father on his daughter, on her marriage, and he gives her, during life, sundry negroes, and after her death, to the *heirs of her body*; this limitation, which would create a perpetuity in a chattel, is too remote, and will vest the whole in the first taker, so as to make them liable to the husband's debts, 471

MASTER AND SERVANT.

1. A master is not liable in damages for the unauthorized acts of his negroes and servants, done without his knowledge or approbation, except it be in the way of trade, or in the exercise of some public employment or trust, 345
2. A master may maintain his action against another for beating his slave, 70

MECHANICS' BOOKS.

Mechanics' books of account are good evidences to prove their accounts to a jury, in the same manner as merchants' books, 362

See Tradesmen's Books.

MERCHANTS AND COPARTNERS.

1. The acknowledgment of one copartner of the justness of an account current transmitted against the copartnership, will bind the others, though it be after the dissolution of the copartnership; for it is not in the nature of a new contract, but the recognition of an old one, made while the copartnership existed, 533

See Partners.

2. Where a suit is brought against the surviving copartners, and the names of the survivors only are named in the writ, but the names of the whole are set forth in the declaration, it is good, as the declaration is an enlargement of the original writ, 543

MORTGAGE AND MORTGAGEE.

1. A mortgage does not lose its lien by not being recorded. Any judgment afterwards, must be subject to this prior encumbrance, 80
2. A mortgagee has his choice of two remedies, where the mortgaged lands have been sold by a sheriff, under a judgment subsequent to such mortgage, and the money paid over by the sheriff to the judgment creditor: he may either go on in equity, and foreclose his mortgage, and resell the premises, or he may relinquish his lien on the land, and go on against the creditor who received the price of the land, as for money paid and received to his use, 82
3. Where lands have been mortgaged by a testator in his life-time, and there are some judgments against him prior to such mortgage, and some after, any moneys coming into the hands of a sheriff, from any executions arising from the sale of negroes or other personal property, under the junior judgments, shall be appropria-

ted first to the payment of the elder judgments, so as to leave the mortgaged premises clear and unencumbered, to pay and satisfy the mortgagee, agreeable to the order in which it really stood at the time of the transaction, 86

4. Where there are two mortgages of the same lands, and the elder mortgage is recorded in the *secretary's office*, and the younger recorded in the *register's office of mesne conveyances*, the younger mortgage shall have a preference, under the act to prevent double mortgages from the same person, inasmuch as this younger mortgage was recorded in the proper office, appointed by law for recording mortgages on lands, and the former not, 509

N

NEGROES.

1. The unauthorized acts of negroes, done without the master or owner's orders or consent, will not subject the master to damages, unless in the way of trade, or a public employment, 345

See Master and Servant.

2. A negro dealing with a clerk of a shopkeeper without a ticket from his master or employer, is not sufficient to charge such shop-keeper on an indictment under the act, unless the knowledge of the fact was brought home to him, 360

3. In an action to try the freedom of a negro, an order for security on the part of the defendant, for his forthcoming and good treatment, may be made at any time during the pendency of the suit, as well as at its commencement, 436

4. The beating of a negro is actionable on the part of the master, as he has no other protector than him, and possesses no civil rights himself, 70

See Master and Servant.

NEWSPAPERS.

Advertisements in a newspaper, not proper evidence to go to a jury, unless in cases of slander or libels, or the like, 492

See Evidence.

NEW TRIAL.

1. In intricate cases of a doubtful nature, the court will exercise its discretion in granting or refusing a new trial, the better to answer the ends of justice, 126

2. Where a third trial is moved for, after two concurring verdicts, the court will very rarely grant a new trial, unless some plain rule of law is violated, 153

3. The court will very seldom grant a new trial in *slander*, unless the damages are outrageously high, 204

4. The discovery of evidence no ground for a new trial, after trial and conviction, 267

5. In violent and unprovoked assaults, the court will not grant a new trial on account of heavy damages; but let violent and turbulent men take the consequences of their rude and offensive behaviour, 416

6. The court will order a new trial in all criminal cases, where the presiding judge shall report that the conviction was without, or contrary to evidence, 520

7. The court will direct a new trial, where a jury take upon them to presume fraud, where none is proved, *ib.*

8. But in some cases, where there are very strong grounds to presume fraud, in making a marriage settlement, the court will order a new trial, in order to have the point more fully cleared up, 546

See Marriage Settlement.

9. Court will not grant a new trial for a mistake in a jury in point of law, upon a summary process, where the party takes the case from the court and sends it to the jury, 101

See Summary Process.

NONSUIT.

1. Where there is a failure of evidence to support the suit, or maintain the action, the presiding judge ought to order a nonsuit; as it would be a nugatory act, to send such unsupported cause to a jury; but where there is testimony, though of a doubtful nature, or depending only on a long train of circumstances, or on facts contradictory in themselves, the court should send the case to a jury, to determine between the parties, and not cut the plaintiff off from a chance of justice, 126
Also, page 445.
2. A nonsuit does not make executors liable for costs, 399
3. A nonsuit set aside for refusing to let a cause go to the jury, where there were strong presumptive circumstances in favour of the execution of a deed under whom the plaintiff claimed, though the actual proof of its execution by one of the grantors, was not made, which should have been submitted to a jury under all the circumstances of the case, 189. 192
4. Nonsuit set aside, because it appeared plaintiff was prevented *by accident* from attending on his cause at the call of the docket, and that his witnesses did not attend according to promise, owing to high freshes in the water-courses, &c. 417
5. Nonsuit set aside, because the judge who presided, ruled that a *fi. fa.* was an essential link of title where a plaintiff claims under a sheriff's deed, and that it should be produced, or its loss satisfactorily accounted for, 441

O

OBLIGOR AND OBLIGATION.

1. Where one joint obligor to a bond is entitled to privilege on account of his being a member of the legislature, it shall not protect his co-obligor from an arrest, 406

See Privilege.

2. Where a release is given to one joint-obligor to a bond, it is a release to the whole, 517

See Release.

P

PARDON.

A pardon from the governor, of an offender, (convicted of an offence where a fine is imposed, one half of which is given by law to a prosecutor,) will not discharge the moiety which goes to the prosecutor, nor will it excuse the sheriff, on a rule upon him to pay the money into court, with the costs of prosecution, 565

PAROL TESTIMONY.

Parol testimony may be admitted to shew the real situation of land mentioned in a grant, and to explain any mistake in such grant, 539

PARTNERS.

1. The acknowledgment of one copartner of a mercantile house, of the justness of an account current transmitted, and of the balance due, shall bind the other copartners, though it be after the dissolution of the copartnership; for it is not in nature of a new contract, but the recognition of an old one, made while the partnership existed, 533

See Merchants.

2. Where the names of the survivors of a partnership only, are mentioned in the writ, but the whole of them are set forth in the declaration, who composed such copartnership while alive, it is good, because the declaration is only an enlargement of the writ, and because it might be pleaded in bar to any other possible suit for the same demand, 543

PLEAS AND PLEADINGS.

1. Where there are several counts in a

declaration, some good and others bad, a general finding by a jury will support the good counts, 204
2. All motions for leave to plead double must be made in court, and not in chambers, 407

PLENE ADMINISTRAVIT.

The omission of an executor to put in his plea of *plene administravit*, in order to shew that all the personal assets of the estate were exhausted, will not deprive a judgment creditor of his right to sell any of the lands of the testator, (although they may be specifically devised away,) in order to satisfy his judgment: nor will a *bona fide* purchaser's title be affected by any such omission, 329

See Legacy and Legatee.

POLICY OF INSURANCE.

1. In the construction of a policy of insurance, the intent and meaning of the parties ought to govern. The privilege of calling at an intermediate port on a voyage, ought not to be construed into an obligation to do so, unless circumstances should make it necessary, 220
It is no deviation, therefore, within the meaning of the policy, not to call at such intermediate port, *ib.*
2. A ship parting from convoy by stress of weather, will not vitiate the policy so as to exonerate the underwriters, 237

See Convoy; also, Warranty, Protest, &c.

POSSESSION.

1. Four years' peaceable and uninterrupted possession of negroes or other chattels, gives a good title to the possessor under the act of limitations, 425
Where a defendant sells negroes to a *bona fide* purchaser for a valuable consideration, when there is an execution in the sheriff's office against him, the sheriff has no right, (after four years' peaceable possession by the purchaser,) under a renewed execution, to seize and sell them, under pretence that they were bound by a former execution 156
And trespass will lie against a sheriff who may attempt to take them into his custody, after such possession, 156

See also, page 425.

2. Five years' peaceable and uninterrupted possession of land gives a good title under the act of limitations to the possessor; so that a sale made by a defendant who had a judgment against him, to a *bona fide* purchaser *who held five years*, was held good notwithstanding such judgment, 339
3. A judgment creditor, laying by five years without renewing his judgment, and taking out his execution, and selling the defendant's land, loses his lien on the land as against a *bona fide* purchaser, by the operation of the statute of limitation; although as between plaintiff and defendant, the judgment would have bound the land without limitation of time, 343
4. Four years' peaceable possession of a negro, or other chattel, even if such possession was tortious in the origin, is a good title under the act of limitations, 425
5. Five years' possession of land, where a party purchases under a defective title, (knowing of the defect,) is a good title; for the party may rely on which title he pleases; and his possessory right will bear him out, even if the other fails, 429

PRACTICE.

No declaration can be filed in any cause, after the expiration of the year and day from the return of the writ, 414

See Declaration.

PRESUMPTION.

Presumptive evidence may in some special cases be allowed, to prove facts from circumstances which could not have happened, unless such facts had pre-existed, 139

PRICE.

A sound price deserves a sound commodity, and a full or valuable consideration raises in law an implied warranty against all faults known, and unknown to the seller, in case

such commodity turns out to be unsound at the time of sale, 19. 380

PRIMOGENITURE.

The act for abolishing the right of primogeniture, and for the more equal distribution of intestates' estates, does not carry down the distribution further among collateral relations, than brothers' and sisters' children, 293

PRISON BOUNDS.

Where a bond is given for remaining within the prison bounds, and the defendant afterwards goes without the limits, &c. and the plaintiff afterwards sues out a second execution for an escape, and imprisons the defendant, he shall not afterwards have his action on his bond, against the defendant's security, because he has made his election, and obtained the highest satisfaction in law, the body of the defendant, 208

PRIVILEGE.

The privilege of one co-obligor to a bond, as a member of the legislature, will not excuse the other obligor from an arrest who is not privileged, 406

PROCESS SUMMARY.*

1. In a case on summary process, where a party takes it from the court and sends it to a jury, and chooses to rely on their verdict, he shall be bound by it, as much so as if he had submitted his case to arbitrators. They are to be considered as judges and jurors of his own choosing, and the court will not grant a new trial for any mistake in point of law, 101

See New Trial.

2. In the summary jurisdiction of the court of common pleas, where the defendant wishes to have the benefit of the plaintiff's answer on oath, to any material point in the case, he must give notice in writing, specifying the points particularly he wishes to have answered. But this equitable mode is never to be resorted to, till the common law rules of evidence fail, and the party has no other relief, 280
3. Upon a summary process a defendant is never to be called upon to admit or deny a debt on oath, nor has the plaintiff a right to resort to equitable principles, where he has a remedy at common law, 326
4. An imparlance is not allowable as a matter of course on a summary process, though on cause shewn, it will be granted as in other cases where a cause is postponed on reasonable grounds offered to the court, 327

See Imparlance.

PROHIBITION.

1. A prohibition will not lie against commissioners, for laying off and making a new street, agreeably to the directions of an act of the legislature, because the owners have not been compensated for the land over which it is to run, 38

See East Bay Street.

2. A prohibition will lay to an inferior court, where it takes cognisance of a

* As the reader who is unacquainted with the proceedings in the courts of *South Carolina*, may not understand correctly what is meant by a *summary process*, which is frequently mentioned in the preceding reports, it may be necessary to inform him, that by an act of the legislature of the state, a power is given to the judges of the court of common pleas (in order to prevent expense and delay) to hear and finally determine, in a *summary manner*, all matters where *the demand is under 20l. sterling*, without the intervention of a jury; hence the origin of the *summary process*, in which the parties have all the advantages of *law* and *equity*, for which reason he will frequently find the principles of both jurisdictions, *in those small cases*, blended together. But either party may, if he chooses, take his case from the decision of the judge, and send it to a jury of his country, if he prefers their verdict to the decree or judgment of the court, which, however, is very seldom done.

note of hand on which a credit has been given, in order to give it jurisdiction, 180

PROTEST.

1. A protest of master and mariners is good evidence of stress of weather, to justify a deviation from the true course of a voyage, and for departing from convoy, in order to charge the underwriters, 237
2. A protest of master and mariners is the best evidence of the original capture, though the condemnation of the vessel, afterwards, will corroborate the fact, and shew the grounds of capture more fully, *ib.*
3. A protest of an inland bill of exchange or note of hand, is not always necessary; other reasonable notice is sufficient, 374

See Indorsor and Indorsee.

But a protest on a foreign bill of exchange is indispensably necessary, *ib.*
4. A protest of a notary, upon the information of his clerk, that the drawer was not to be found to demand payment from him, is not good. The protest should be founded on his own knowledge, on inquiry at the drawer's residence, or place of abode, 410

POSTMASTER.

A postmaster is not liable for money lost out of a letter delivered to the charge of his deputy, when he is not present at the time of delivery; but such deputy shall be answerable for his own negligence, or want of due care, 551

R

RECORDS.

Deeds first recorded, to have a preference. While the county court system was in force, all deeds for lands were to be recorded in the counties where they lay, within six months; but in the other parts of the state, where there were no county courts, no time was fixed for recording them. The only risk the grantee ran was that of another deed for the same land, from the same grantor, being put first on record, which gave the second deed a preference, 251

RELEASE.

A release of one co-obligor to a bond, is a release to the whole; and the assignee of such bond may go over against the grantor of the bond, and recover the amount from him on the ground of failure of consideration, 517

REPLEVIN.

In an action on a replevin bond, the measure of damages must depend on the value of the goods where they are not forthcoming, and the rent exceeds the valuation of them. But if the value of the goods be more than the rent, then the rent in arrear is the true measure of damages, 408
No interest, however, is allowable in either case, as the condition of the bond is for the return of the goods distrained, or pay the value, *ib.*

See Interest.

RESERVATION.

A reservation of lands for a town, for the use of the inhabitants of a township, is a covenant between the state and the people, that it shall be appropriated to and for no other use or purpose, and any grant on the said land, afterwards, to an individual for his private use, must be founded in fraud, or obtained on false suggestions, 195
The state becomes a trustee for the inhabitants of such township after the reservation is made, 203

RICE.

All rice shipped in *South Carolina* for a foreign market, must be examined at the shipping port, before it is put on shipboard; otherwise the shipper takes it at his own risk; and its quality is not afterwards to be tested by an examination at the port of delivery, or place to which it is exported,

See Contract. 498

ROADS AND HIGHWAYS.

1. The legislature of the state has a right to appropriate vacant unoccupied lands to the purposes of making streets and public highways, and also all necessary materials for keeping them in repair, without making any compensation to the owners of the lands over which they may pass, 38
2. Every parish and district throughout the state is bound to keep its own roads, bridges and causeys in repair, and to defray the necessary expenses attending the same, 63

SCIRE FACIAS.

In a judgment on a *scire facias*, the plaintiff is entitled to his execution *instanter*, and is not obliged to wait 30 days after the rising of the court, as in common cases, 68

SEAWORTHINESS.

1. Where a vessel proves leaky, and unfit for sea the day after she leaves port, without any violent gale of wind or accident to make her unseaworthy, it is strongly presumptive she was so when she sailed, unless the presumption is removed by strong evidence to the contrary, 503
2. Where a vessel proves leaky and unfit for sea, while taking in her cargo, the freighters may take out such part of the cargo as was put on board, and ship it on board of another vessel. They are not obliged to wait until she is repaired; otherwise, if she had sailed and had met with an accident in the course of her voyage, 492

SET-OFF.

See Discount; also Torts and Trespasses.

SETTLEMENT.

A marriage settlement not to be deemed fraudulent because it is voluntary, unless it is made to defeat creditors; yet if there are strong grounds of fraud about it, the court will grant a *new trial* to have them cleared up, 546

See New Trial.

SHERIFF.

1. A sheriff ought to return money into court, which is raised by the sale of property claimed by a third person, to abide the decision of the court upon the subject, and then to make his return on the execution, agreeably to the decision of the court, 67
A bond given him to indemnify him for not making such return, is void, *ib.*
2. A sheriff is liable for money paid to a clerk in the sheriff's office, who embezzles it, although such clerk may not have been authorized by him to receive money; the bare placing him in a public office, and in a public situation, holds out an idea of trust, and makes the sheriff responsible, 90
See also page 112., where the same point was determined.
3. Where a sheriff has made a levy by virtue of a *fi. fa.* he may proceed to sell personal property after the expiration of the year and day for renewing the execution, or even after he is out of office, 126

See Execution.

4. At sheriffs' sales, the claim of a widow's dower is no reason why a purchaser should not pay the bid for a house and lot, 169
Caveat emptor is a good rule in such cases, *ib.*

See Caveat Emptor.

5. A sheriff's deputy, taking insufficient bail, makes his principal liable, 175
6. A sheriff's deed good, although the *fi. fa.* is not produced on the trial, 441
7. Where a sheriff's sale and deed are both made several months after the return day mentioned in the *fi. fa.*, it is bad, because the sheriff's authority had ceased before the sale was made, unless the *fi. fa.* had been renewed, 524

SLANDER.

1. In an action of slander, the court will

seldom grant a new trial on account of heavy damages, unless they are very outrageous, 204
2. In slander, where some counts in the declaration are good, and others bad, a general finding will support the good counts, *ib.*
Same point also, 439.

See Pleas and Pleadings.

SLAVE.

The battery of a slave is actionable by the master, who is bound to protect him, though the slave himself can maintain no action, 70
If a slave misbehave, complaint should be made to the master in the first place, and if he will not give redress, then application should be made to a magistrate, whose duty it is to see that reasonable satisfaction be made for the injury complained of; but no man ought to take or revenge himself by his own arm, *ib.*

SOLE TRADER.

Where a *feme covert* keeps a shop and carries on trade for a number of years in her own name, in which the husband never intermeddles, or has no concern, it will constitute her a sole dealer, 162
2. A *feme covert* who carries on dealings on her own account for many years, against whom a creditor has obtained a judgment, shall not be allowed to impeach it on the ground of *coverture*, after several years standing, because she ought to have taken advantage of it in pleading, &c. 333

See Feme Covert; also, Judgment.

SOUND PRICE.

A sound price deserves a sound commodity, and raises an implied warranty to repay back the consideration money, *in case the thing sold turn out otherwise*, 380
But where a purchaser is fully informed of all the circumstances, and has had a fair and full opportunity of informing himself of them, he shall be held to his bargain, though it turn out to be a losing one, 380
Inadequacy of consideration is not a good ground alone for setting aside a contract, where there is no fraud, 384

SUNDAY.

If a verdict be delivered in after 12 o'clock on *Saturday* night, and recorded on *Sunday* morning, it is void, 232

SURVEYS OF LAND.

1. All rules of survey, made under the authority of the court, should be directed to a sworn surveyor, or a lawful deputy under the surveyor-general, as no others can swear the chain-carriers, and no *ex parte* survey shall be received in evidence, unless due and reasonable notice shall have been given to the opposite party, of the time of making it, and proof made of it, and also of the opponent's neglect or refusal to attend on such survey, 437
2. On all resurveys of land by order of court, where marked trees or lines can be found, or other natural boundaries or corners, they ought to govern in making such resurveys, but where they cannot be found, then courses and distances ought to be resorted to, as the next best standards, 515

T

TRADESMEN'S BOOKS.

The original entries or books of accounts of tradesmen and mechanics, are good evidence to prove work and labour, &c. 362

TAVERN LICENSES.

Tavern licenses, and licenses for billiard tables, are to be made out and issued by the clerks of the courts of sessions in the different districts throughout the state, upon the recommendation

of the commissioners of the high roads, and not by the commissioners themselves, or others acting under their authority, 316
And all bonds taken for the good behaviour of tavern-keepers, &c. are to be deposited in the clerks' offices, &c. *ib.*

TAXES.

Taxes due to the state are to have a preference to all private debts, judgments, or mortgages, &c.; they create a lien paramount to every other demand whatever, 244
And where a man does not make a due return of his taxable property, he is liable to be doubly taxed, 250

TORTS AND TRESPASSES.

1. The action of trespass to *try title to land*, is substituted in lieu of the old action of ejectment, in which *mesne* profits may be recovered as well as possession of the land, 115. 119
A second action of trespass to try title to land, is allowed to every man, after failure in the first action, if it be commenced within two years after the determination of the first, 115

See Action; also, Ejectment.

2. Torts and trespasses cannot be set off or discounted against any pecuniary demand, 351
And where they are blended together, the court will oblige a party to discriminate between them and debt, *ib.*
3. In the action to try title, it is necessary that some trespass, however small, has been committed on the premises, in order to maintain this suit, 421
4. In support of the action of trespass to try title to land, the plaintiff is not confined to any one kind of title, but may rely on as many as he pleases, and if any one is sufficient to bear him out, it will entitle him to a verdict, 474

TRIAL AND NEW TRIAL.

1. The court will in all cases, where juries find against the plain rules of law, or against evidence, order new trials, *toties quoties*, &c. until twelve men can be found, firm enough to support the legal institutions of the country, 33
2. No motion for a new trial in a criminal case, where infamous or corporal punishment is either certain or probable, will be heard, unless the defendant is present in court, ready to abide the judgment, 34. 99
3. In order to put off a trial, some good grounds ought to be stated to the court on oath, to justify a delay; but an agreement not to press on a cause till both parties are ready, is nugatory; as it might happen that when one was ready, the other might not; so, peradventure, the cause never would be tried, 440
4. On a motion to put off a cause on account of the absence of witnesses to support a discount, in which torts and money were blended together, the court ruled that the defendant should state which of the items he meant to prove by his witnesses, as torts and trespasses were not in their nature discountable; and so if his witnesses were to prove torts or trespasses, that would be no ground to put the trial off. A proper discrimination was therefore necessary, before the court could judge of the motion, 351

U

UMPIRE.

See Awards.

UNDERWRITERS.

Underwriters upon a policy of insurance become liable upon capture of a ship or vessel, and the insured then have a right to abandon. But if the captain or supercargo think it advisable for all concerned to interpose a claim in a court of vice-admiralty, it is not too late for the insured to make their election to abandon after the decision in the court of vice-admiralty is known, 307
Where, upon a claim being put in,

a vice-admiralty court orders the vessel and cargo to be restored to claimants, upon giving security to captors for the appraised valuation, to be paid if an appeal is affirmed, this is not to be considered as a restitution of the property, only an interlocutory decree; which may be compared to goods seized for rent at common law, and replevied on giving bond and security; it is not conclusive and definitive between the parties, 307
The delay and uncertainty are risks within the policy, for which the underwriters are answerable, *ib.*

USURY.

1. A note, usurious in its creation, is void in the hands of an innocent indorsee, for valuable consideration, though he knew nothing of the transaction, 23
Such indorsee may, however, recover the amount from the indorsor, on a count for money had and received, *ib.*

See Indorsor.

A broker negotiating the business between the borrower and lender, is a competent witness to prove the usurious transaction, 23
2. In all usurious cases, the defendant himself is a competent witness under the act, to prove the usury; and the plaintiff may also be sworn, to rebut what is offered to be sworn by the defendant, 177

V

VENDUE.

A vendue master, who pays away money to his employer, for the proceeds of goods sold at auction, which are afterwards claimed by a third person, (without notice from such third person of his claim,) is not liable for money had and received to his use,

VERDICT.

Where a jury, in a criminal case, will give a verdict against a defendant, without, or contrary to evidence, the court will, upon report of the judge, set it aside, and order a new trial, 520

ee New Trial.

W

WARRANTY.

1. Selling for a sound price warrants a sound property, 380

See Contract; also, Sound Price.

2. Warranting a ship to sail with convoy, means sailing all the way with convoy, unless driven out of the true course by stress of weather, 237

WILL.

1. Where two of the witnesses to a will are dead, and the third out of the state, proof of their hand-writings by any one credible witness, is sufficient proof to establish a will, 187
2. In the construction of wills, the intention of the testator is the principal thing to be regarded; as where distinct estates are devised to the youngest and next youngest children of the testator, who should arrive at 21 years of age; and the two youngest at the time of the testator's death, both die before they come of age. In that case, the two next youngest children of the testator who survive and arrive at 21 years of age, shall take the estates, as contingent remainders, in the order given by the testator, 255
3. Where all the witnesses to a will are legatees, and are to take a beneficiary interest under it, none of them can be admitted to prove it, unless a release is given by one of them, of all his claim under such will, 448
Where all the witnesses to a will are dead, the proof of the hand-writings of two of them not sufficient to establish the will, the hand-writings of the whole should be proved, before the proof of the testator's is allowed, 484

WITNESS.

1. A party offering a contempt to a justice of the peace, is not a competent witness to criminate the justice so as to make him liable in damages, in a special action on the case for false imprisonment, 1
2. Witnesses may be compelled by *subpœna*, to appear and make affidavits of extenuating circumstances, on the sentence day of the court of sessions, as well as to give evidence on a trial before a jury, 62
3. The obligee of a bond, who has assigned it over to a third person for a valuable consideration, is an incompetent witness to prove payment of it by the obligor, 93
4. In usurious cases, both plaintiff and defendant are competent witnesses, 177
5. Where all the witnesses to a bargain and sale are dead or out of the state, their hand-writings must be proved, before the grantor's to the deed, 187
6. Where a witness has got his release to make him competent, he is not to be confined to any one point in the case, but may be examined touching any and all the points in it, 463
7. A witness who has been a confederate in an offence cognisable by a justice of the peace, is not competent to contradict the warrant of commitment by the justice, for a contempt offered to him in his office, 1

See Justice of the Peace.

WRIT.

1. A writ of right never was in use in this state. Ejectment formerly, and trespass to try title, under the act of 1791, were the only modes of trying title to lands in this state, 135
2. On the execution of a writ of inquiry, the jury are bound to give some damages, however small, to the plaintiff; as the defendant's suffering a judgment to go against him by default, admits that something is due, 405
3. Where a writ or process is lodged after the return day of a court, and before the first day of the sitting thereof, it may be made returnable to the second court, 507
4. Where a case is put upon the writ of inquiry docket, the defendant has a right to set aside the interlocutory judgment, when the cause is called, and move for leave to plead double, 521

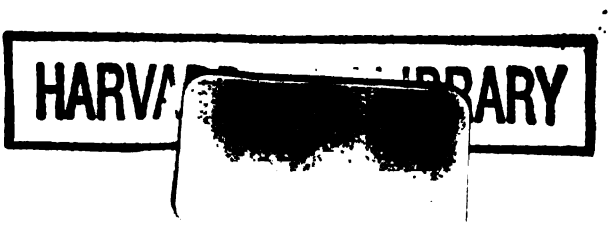
Y

YEAR AND DAY.

The time which determines the right of the parties in many instances, does not expire for *renewing executions*, until the last day the execution has to run in court; although it may exceed the calendar year and day from the time of its being lodged in the sheriff's office, 120
Any delay, occasioned by the defendant himself, by injunction out of chancery, or a motion for a new trial, or in arrest of judgment, &c. not to be taken into the account, 126

END OF VOLUME SECOND.

C. C. N. C.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